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Expanding the Public Policy Exception to the Employment-at-Will Doctrine: Borse v. Piece Goods Shop, Inc.

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Notes

EXPANDING THE PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT-AT-WILL DOCTRINE: *BORSE v. PIECE GOODS SHOP, INC.*

I. INTRODUCTION

Beginning in the late 1800s, the employment-at-will doctrine has secured a stronghold in the American legal system.[1] The doctrine permits an employer to discharge an at-will employee without liability for a good reason, a bad reason or no reason at all.[2] In the past fifteen years, however, courts have limited an employer's ability to dismiss an at-will employee by developing exceptions to the doctrine.[3] For example,

1. *See* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719 (1991) (surveying origin and development of employment-at-will doctrine, and examining how courts have dealt with doctrine's declining acceptance). The employment-at-will doctrine is purely an American creation. *Id.* at 721. It is thought that Horace Wood first developed the theory in his 1877 treatise on the law of master and servant. *Id.* at 722. In his treatise, Wood stated that:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

Id. (quoting HORACE WOOD, LAW OF MASTER AND SERVANT 272 (1877)).

This theory soon grew in acceptance as being "well suited to employer needs in America's developing industrial and commercial society." *Id.*; *see also* Darlington v. General Elec., 504 A.2d 306, 309 (Pa. Super. Ct. 1986) ("There is little question that the rationale for the prevailing rule was based on the assumption that it was necessary to preserve managerial discretion in the workplace and to maintain freedom of contract.").

While the *Restatement of Contracts* did not include the employment-at-will doctrine, the United States Supreme Court endorsed the doctrine in Coppage v. Kansas, 236 U.S. 1 (1915) and Adair v. Unites States, 208 U.S. 161 (1908). Peck, *supra*, at 723. Consequently, the doctrine's acceptance was subsequently viewed as a well-settled principle in American employment law. For a further discussion of the origins of the doctrine, see Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U. PITT. L. REV. 641 (1990).

2. *See* Henry J. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where does Employer Self Interest Lie?*, 58 CINN. L. REV. 397, 397 n.1 (1989). Today, the employment-at-will doctrine takes the form of a presumption that all employees are at-will employees. *Id.* An employee can rebut this presumption by providing evidence of a contractual provision providing otherwise, by demonstrating a violation of a common-law doctrine or by showing a statutory violation. *Id.* For a discussion of the at-will presumption in Pennsylvania, see *infra* note 62.

3. *See* Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State*

under the public policy exception, an employer may incur liability for dismissing an at-will employee if the dismissal violates a recognized and significant public policy.[4]

The Pennsylvania Supreme Court first suggested that Pennsylvania law might recognize a wrongful discharge action based on a public policy violation in *Geary v. United States Steel Corp.*[5] Interpreting *Geary* as endorsing the public policy exception, federal and lower state courts in Pennsylvania gradually expanded the exception's scope.[6] *Borse v. Piece Goods Shop*[7] is among the Third Circuit's most recent applications of the public policy exception under Pennsylvania law.[8] In *Borse*, the Third

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Law: The Employment At Will Doctrine in Pennsylvania, 133 U. PA. L. REV. 227, 245-47 (1984).

Commentators have grouped wrongful discharge actions into three general categories: "(1) public policy, (2) implied contract and (3) implied covenant of good faith and fair dealing. Squire, *supra* note 1, at 642 n.4; *see also* Perritt, *supra* note 2, at 398-99 (labeling three categories of actions as implied-in-fact contract theory, public policy tort theory and covenant theory).

4. *See* Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. Ct. 1978) ("[O]ur Supreme Court has indicated that where a clear mandate of public policy is violated by the termination, the employer's right to discharge may be circumscribed.").

5. 319 A.2d 174, 180 (Pa. 1974). *Geary* was the first Pennsylvania Supreme Court decision to consider the validity of a public policy exception to the employment-at-will doctrine. *Id.* at 175. The *Geary* court held that while situations may arise in which public policy is threatened, as long as the employer has a legitimate reason for dismissing the employee, there is no cause of action for wrongful discharge. *Id.* at 180. For a further discussion of *Geary*, see *infra* notes 66-69 and accompanying text.

6. *See* Woodson v. AMF Leisureland Ctrs., Inc., 842 F.2d 699, 702-03 (3d Cir. 1988) (finding public policy violation where employer dismissed employee for refusing to serve alcohol to person employee reasonably believed was intoxicated); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365 (3d Cir. 1979) (finding public policy violation where employee was dismissed for refusing to submit to polygraph test); Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776, 779 (W.D. Pa. 1982) (finding public policy violation where employee was dismissed for reporting traffic violations); McNulty v. Borden, Inc., 474 F. Supp. 1111, 1119 (E.D. Pa. 1979) (finding public policy violation where employee was dismissed after refusing to violate anti-trust laws); Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1180 (Pa. Super. Ct. 1989) (finding public policy violation where employee was dismissed for "perform[ing] a duty he was required to perform under federal law"); Hunter v. Port Auth., 419 A.2d 631, 638 (Pa. Super. Ct. 1980) (finding public policy violation where employer denied employment to individual due to prior conviction that was subsequently pardoned); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. Ct. 1978) (finding public policy against firing employee for attending jury duty).

7. 963 F.2d 611 (3d Cir. 1992). Subsequent to the Third Circuit's decision, the plaintiff filed a petition for a rehearing before the full panel. *Id.* at 626. However, this petition was denied. *Id.*

8. Since *Borse*, the Third Circuit has examined the public policy exception on one other occasion. *See* Clark v. Modern Group Ltd., 9 F.3d 321, 332 (3d Cir. 1993) (holding that employee does not state wrongful discharge action after being terminated for refusing to follow employer's instruction that employee reasonably, but erroneously, believed violated the law).

Circuit held that dismissing an at-will employee for failing to consent to an urinalysis drug screening and personal property search may violate Pennsylvania's public policy against the tortious invasion of an employee's privacy.[9] To ascertain whether the employer's drug testing program tortiously invades an employee's privacy, the court must first determine whether the drug testing program is highly offensive to a reasonable person.[10] This is accomplished by balancing the employee's privacy interest in refusing to participate in the program against the employer's interest in maintaining a drug free workplace.[11] If the court determines that the program is highly offensive and thus tortiously invades the employee's privacy, an employee who is discharged for refusing to participate in an urinalysis drug testing program can sustain a wrongful discharge action against his or her employer.[12]

This Note examines the Third Circuit's decision in *Borse* and its impact on the employment-at-will doctrine in Pennsylvania. Section II surveys the development of the public policy exception and examines various approaches to the doctrine taken by courts around the country.[13] Section III surveys the evolution of the employment-at-will doctrine under Pennsylvania law in both the Pennsylvania state courts and the Third Circuit, focusing on the development of the public policy exception, the parameters of the exception and the possible sources of public policy.[14] Section IV examines the privacy issues implicated in urinalysis screening and drug testing programs.[15] Section V examines the Third Circuit's analysis and conclusions in *Borse*.[16] Finally, Section VI of this Note discusses the impact the *Borse* decision is likely to have on an employer's decision to initiate a drug testing program and attempts to establish guidelines for Pennsylvania employers who choose to de-

9. *Borse*, 963 F.2d at 623. The *Borse* court held that "[i]f the [Pennsylvania Supreme Court] determined that the discharge was related to a substantial and highly offensive invasion of the employee's privacy, we believe that it would conclude that the discharge violated public policy." *Id.* For a further discussion of the court's holding in *Borse*, see *infra* notes 226-326 and accompanying text.

10. *Borse*, 963 F.2d at 627.

11. *Id.*

12. *Id.* at 623, 627.

13. For a discussion of the various approaches to the public policy exception, see *infra* notes 32-61 and accompanying text.

14. For a discussion of the evolution of the public policy exception under Pennsylvania law, see *infra* notes 62-195 and accompanying text.

15. For a discussion of urinalysis drug testing and other privacy issues, see *infra* notes 196-225 and accompanying text.

This Note specifically addresses the problems raised by drug testing in the workplace. While Piece Goods Shop's program included personal property searches, the *Borse* court noted that identical issues are implicated by the program's separate aspects. *Borse*, 963 F.2d at 623. Therefore, this Note will not address the issues implicated in personal property searches by private employers.

16. For a discussion of the *Borse* decision, see *infra* notes 226-301 and accompanying text.

velop a drug testing program.[17]

II. THE EMPLOYMENT-AT-WILL DOCTRINE AND THE PUBLIC POLICY EXCEPTION: DEVELOPMENT IN THE UNITED STATES

One of the most significant developments in employment law in the past thirty years has been the gradual erosion of the employment-at-will doctrine.[18] While most states continue to recognize the employer's power to discharge at will, exceptions developed by the courts and legislatures have limited the doctrine's effectiveness.[19] Almost all states now recognize at least one common-law action impeding an employer's power of discharge.[20] Among the common-law doctrines utilized by courts include the theories of implied contract, implied covenant and the public policy exception.[21]

The public policy exception was first articulated in 1959 by the California Appellate Court in *Petermann v. International Brotherhood of Teamsters*.[22] The employee in *Petermann* claimed that his employer discharged him for refusing to commit perjury before a state legislative committee.[23] While the *Petermann* court recognized the employee's at-will employment status, it nevertheless stated that the "right to discharge an [at-will employee] may be limited by statute or by considerations of pubic policy."[24] Because of the doctrine's firm position in American law,

17. For a discussion of the impact of the *Borse* decision, see *infra* notes 302-26 and accompanying text.

18. Most commentators who have written on the topic of the employment-at-will doctrine agree as to this point. *See, e.g.*, Kurt H. Decker, *At-Will Employment in Pennsylvania—A Proposal For Its Abolition And Statutory Regulation*, 87 DICK. L. REV. 477, 482-86 (1983); Perritt, *supra* note 2, at 397.

19. *See* PAUL I. WEINER, WRONGFUL DISCHARGE CLAIMS—A PREVENTIVE APPROACH 10 (1986) (noting that while exceptions restrict employer's power of discharge, they do not restrict general applicability of employment-at-will doctrine).

20. *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE §§ 1.13-1.63 (3d ed. 1992) (surveying jurisdictions that recognize exceptions to employment-at-will doctrine).

21. One commentator noted the different theories inherent in each of the doctrines. For instance:

> Implied contract exceptions show the courts' uneasiness with the notion that express representations of job security must be linked to an agreed duration of employment in order to be enforceable, or that employment agreements are so inherently different from other types of agreements that they should not import the same duty of good faith and fair dealing imposed by custom or statute in other commercial relationships.

Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 648 (1987-88).

22. 344 P.2d 25 (Cal. App. 1959).

23. *Id.* at 26.

24. *Id.* at 27 (citations omitted). In finding a violation of public policy, the *Petermann* court defined public policy as "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public

however, *Petermann* was not viewed as creating a general exception to the employment-at-will doctrine.[25]

It was not until *Monge v. Beebe Rubber Co.*[26] that a court judicially extended a general limitation over the employer's power to discharge.[27] In *Monge*, the plaintiff was discharged after refusing sexual advances from her manager.[28] In restricting the employment-at-will doctrine, the New Hampshire Supreme Court opined that no economic or social benefit results from the discharge of an at-will employee when the discharge is "motivated by bad faith or malice or based on retaliation."[29] Allowing a wrongful discharge action in these circumstances provides stability to the employee while allowing the employer to retain his normal freedom to discharge an employee when economics and efficiency require such a dismissal.[30] Since *Monge*, at least forty-three states have either judicially or legislatively recognized the public policy exception.[31]

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or against the public good." *Id.* (citing Safeway Stores v. Retail Clerks International Ass'n, 261 P.2d 721, 726 (Cal. 1953)). Recognizing that perjury is unlawful and interferes with the proper administration of justice, the court held that "in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee." *Id.* The court concluded that any impediment to the encouragement of truthful testimony must be struck down. *Id.*

25. Peck, *supra* note 1, at 723-24 & n.24 (noting that only two law review articles mentioned case year following decision).

26. 316 A.2d 549 (N.H. 1974).

27. Peck, *supra* note 1, at 724.

Prior to *Monge*, the Indiana Supreme Court, in 1973, also allowed a wrongful discharge claim in Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973). In *Frampton*, the plaintiff was fired for filing a workman's compensation claim. *Id.* at 428. In upholding the plaintiff's cause of action the court recognized the need to protect an individual's exercise of statutorily conferred rights. *Id.*

28. 316 A.2d at 550.

29. *Id.* at 551. In creating this new remedy, the court noted that all employment contracts involve balancing "the employer's interests in running his business . . . against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two." *Id.* The court held that terminations motivated by bad faith or malice or based on retaliation are not in the best interests of the public and constitute a breach of the employment contract. *Id.*

30. *Id.* at 552.

31. PERRITT, *supra* note 20. Several states however, refuse to recognize the public policy exception. Among these states are New York, Maine, Alabama, Louisiana and Mississippi. There are various reasons why these courts have refused to apply the public policy tort. For instance, in Murphy v. American Home Products Corp., 448 N.E.2d 86 (N.Y. 1983), the New York Supreme Court held that the legislature must initiate any deviations from the employment-at-will rule. *Id.* at 89-90. The *Murphy* court reasoned that the:

> Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested, and to investigate and anticipate the impact of imposition of such liability.

When applying the public policy exception, courts are confronted with two central questions.[32] First, a court must determine whether the employee's discharge violates or threatens a particular public policy.[33] The court may derive the public policy from one of a number of sources, including statutes, constitutions, administrative regulations, professional standards or the common law.[34] Second, a court must determine whether a violation of that policy by terminating an employee justifies an employee's recovery for wrongful discharge.[35] Generally, in answering these questions, courts have either broadly or narrowly defined the public policy exception.[36] Courts that broadly define the exception look to

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Id. The court envisioned a "principled statutory scheme" that adequately balances the competing interests involved and that can be applied only prospectively. *Id.* at 90. Other courts have given little or no reason for their rejection of the doctrine. *See, e.g.*, Gil v. Metal Serv. Corp., 412 So. 2d 706, 708 (La. Ct. App. 1984) (refusing to recognize doctrine when employee terminated for refusing to violate law); Bard v. Bath Iron Works Corp., 590 A.2d 152, 156 (Maine 1991) (stating that Maine has not yet recognized wrongful discharge action).

32. This is the general approach taken by the Pennsylvania Superior Courts. *See* Cisco v. United Parcel Servs., Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (utilizing two-part test in applying public policy exception).

33. *See Cisco*, 476 A.2d at 1343; Squire, *supra* note 1, at 642 n.4 (stating that employee, as part of his or her prima facie case, must show violation of "clear mandate" of public policy). Courts differ as to the strength of the public policy required. Pennsylvania requires a violation of a "clearly mandated public policy which 'strikes at the heart of a citizen's social rights, duties, and responsibilities.'" Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 261 (Pa. Super. Ct. 1985) (quoting Novosel v. Nationwide Insurance Co., 721 F.2d 894, 899 (3d Cir. 1983)).

34. *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980). In *Pierce*, the New Jersey Supreme Court listed the possible sources of the public policy, including "legislation; administrative rules, regulations or decisions; and judicial decision. In certain [situations], a professional code of ethics may contain an expression of public policy." *Id.* The court noted, however, that not all expressions of public policy will support a wrongful discharge action. *Id.* For instance, certain regulations or codes of ethics serve only the profession and not the public in general. *Id.* Such policies, according to the *Pierce* court, may not be sufficient. *Id.* "Absent legislation, the judiciary must define the cause of action in case-by-case determinations." *Id.*

35. *See* GERALD P. PANARO, EMPLOYMENT LAW MANUAL § 7.05 (1993). Panaro finds that this second element involves the employee proving that the activity for which he was dismissed involves public interests and rights and not simply private ones. *Id.* One way a court can make this determination is by balancing the interest furthered by the public policy against the employer's interest in running his business as he sees fit. *Id.* This appears to be the approach originally taken by the Pennsylvania Superior Court in Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611 (Pa. Super. Ct. 1980), and later integrated into the superior court's analysis in Cisco v. United Parcel Services, Inc., 476 A.2d 1340 (Pa. Super. Ct. 1984). For a discussion of *Cisco* and *Yaindl*, see *infra* notes 75-91 and accompanying text.

36. *See* PANARO, *supra* note 35, at § 7.02 (stating that courts either broadly or narrowly define public policy). Courts also differ as to the scope of the exception. For instance, California has expanded the public policy tort doctrine so that an employee need not be an at-will employee in order to sue for wrongful discharge based on a public policy violation. *See Foley v. Interactive Data Corp.*,

a variety of sources for the public policy and apply the doctrine whenever that policy is threatened by the employee's discharge.[37] Courts that narrowly apply the exception restrict themselves to statutory pronouncements of public policy and apply the exception in limited circumstances only.[38] How a court defines the exception largely reflects their view of the strength of the various policies supporting the employment-at-will doctrine.

On one end of the spectrum are states such as Georgia in which only the legislature can create exceptions to the employment-at-will doctrine. In *Borden v. Johnson*,[39] the Georgia Court of Appeals recognized that an employer's power of discharge is restricted by public policy exceptions but held that creating these exceptions is a legislative function.[40] The plaintiff in *Borden* brought a wrongful discharge tort action, claiming that she was terminated because of a pregnancy.[41] The *Borden* court rejected the idea that the courts can allow recovery for wrongful discharge tort claims.[42] The court held that the legislature is responsible for defining both the public policy and the situations under which violating the policy results in employer liability.[43] Any employer liability must arise from a violation of the applicable statute and not through an independent tort action for wrongful discharge.[44] Consequently, under

765 P.2d 373, 377 n.7 (Cal. 1988). Other states, like Pennsylvania, apply the doctrine only to at-will employees. Darlington v. General Elec., 504 A.2d 306, 318 (Pa. Super. Ct. 1986).

37. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894, 903 (3d Cir. 1983) (finding public policy from First Amendment free speech right in absence of state action); Cilley v. New Hampshire Ball Bearings, 514 A.2d 818, 820 (N.H. 1986) (basing wrongful discharge action on non-statutory basis); Delaney v. Taco Time Int'l Inc., 681 P.2d 114 (Or. 1984) (stating that public policy violation can arise from violation of some important "societal obligation").

38. *See* PANARO, *supra* note 35, at § 7.02[2]. In addition to restricting the sources of public policy, a court may also restrict the reasons for the public policy violation. *Id.* Thus, some courts will find public policy violations only when the employer retaliates and fires the employee for exercising his or her statutory rights, for refusing to follow an employer's directive that is against the law or when the dismissal itself directly violated the law. *Id.*

39. 395 S.E.2d 628 (Ga. Ct. App. 1990).

40. *Id.* at 629.

41. *Id.* at 628. The trial court granted the employer's motion for summary judgment. *Id.*

42. *Id.* at 629.

43. *Id.* In this respect the court stated:

> There is, however, a major difference between a general recognition, on the one hand, that there may exist "public policy" exceptions to a long-recognized proposition of state law and a specific recognition, on the other hand, that the determination of the existence of a "public policy" and how to enforce it is a judicial function.

Id.

44. *Id.* at 630. Thus, when an employer terminated an employee in violation of a public policy expressed in a state or federal statute, the employee's remedy is limited to those provided for in the statute defining the public policy. *Id.* Consequently, the court held that unless the Georgia General Assembly has

Georgia law, questions concerning the creation and application of the exception are answered by the legislature, which defines the public policy and determines under what circumstances a violation of the policy gives rise to a wrongful discharge action.

On the other end of the spectrum are those states which allow their courts to develop additional exceptions without any prior legislative mandate of public policy.[45] In these states, courts are free to look towards statutes, constitutions and the common law in defining the public policy, and are free to determine when the violation of these policies gives rise to a wrongful discharge action.[46] Here, the courts have the freedom to answer both of the two questions without relying on the legislature.

In between these two spectrums are the states that allow their courts to create new public policy exceptions, but limit the circumstances in which the courts can discern public policy. This is accomplished either by restricting the sources of public policy or by restricting the situations in which violating that policy gives rise to a wrongful discharge action. One approach limits the exception to violations of statutory rights or duties.[47] Thus, a plaintiff can bring a wrongful discharge action only if he or she is terminated for exercising an explicit statutory right or refusing to violate an explicit statutory duty.[48] This approach not only ties the public policy into a legislative enactment, but restricts the public policies to those mandating a duty or providing a right to

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enacted an applicable public policy exception, a discharged employee cannot bring a separate action for wrongful discharge. *Id.*

45. The opinion of the United States Court of Appeals for the Eighth Circuit's in Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) is a good example of this approach. In *Lucas*, the plaintiff was terminated after refusing to sleep with her supervisor. *Id.* at 1203. The Eighth Circuit, interpreting Arkansas law, held that the public policy exception would come "into play when the reason alleged to be the basis for a discharge is so repugnant to the general good as to deserve the label 'against public policy.' " *Id.* at 1204-05. The court went on to state that this public policy is not restricted to legislative mandates but encompasses common law as well. *Id.* at 1205. Thus the Eighth Circuit concluded that the plaintiff stated a tort claim for wrongful discharge. *Id.*

46. *See* JEFFREY G. ALLEN, THE EMPLOYEE TERMINATION HANDBOOK 8-9 (1986) (finding that courts on this end of spectrum find that "any clear mandate of public policy, whether based on statute or simply judicial decree, will support a claim for wrongful discharge").

47. *See* PERRITT, *supra* note 20, § 5.38.

48. *Id.* Exercising a statutory right is the flipside of refusing to violate a statutory duty. *Id.* The major difference between the two is that refusing to violate a duty reflects a stronger policy. *Id.* When one has a duty not to perform a certain act, he or she has no choice but not to engage in the prohibited conduct. *Id.* On the other hand, when one is given a right, one can choose whether to exercise that right. *Id.* Thus, it can be argued that the policy underlying a duty is stronger than that of underlying a right. *Id.* This approach has been criticized for not dealing with many cases where a wrongful discharge action is warranted. *Id.* § 5.38 at 531.

individuals.[49]

The Wisconsin Supreme Court's opinion in *Bushko v. Miller Brewing Co.*[50] illustrates the statutory right/duty approach.[51] The plaintiff, Bushko, claimed he was terminated for complaining about corporate policies concerning plant safety, hazardous wastes and "honesty."[52] Specifically, Bushko claimed his employer fired him after Bushko confronted his supervisor concerning the unsafe condition of a machine in the plant.[53] As evidence of a public policy, Bushko relied upon a statute prohibiting the installation of machines that do not comply with state safety regulations.[54] The Wisconsin Supreme Court held that the public policy exception applies only when an employee is fired for refusing to violate a statutory or constitutional requirement.[55] The *Bushko* court distinguished acting in conformity with a law with refusing to violate that law at the command of an employer.[56] A person doing the former is merely obeying the law. As the court stated, "[s]uch consistent action, without an employer's command to do otherwise, is merely 'praiseworthy' conduct."[57] Because Bushko was not ordered to violate a statute as a condition of continued employment, the Wisconsin Supreme Court affirmed the employer's summary judgment motion.[58]

In addition to the various approaches taken by state courts, commentators have suggested new ways of analyzing the public policy exception. These range from statutorily creating a just cause requirement to removing the presumption that employees are at-will.[59] One commentator suggests a restrictive balancing of interests approach for analyzing wrongful discharge actions.[60] For an employee to recover upon a

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49. *Id.* at 526. This approach basically results in less judicial activism and more deference to the legislature. *Id.*

50. 396 N.W.2d 167 (Wis. 1986).

51. *Id.*

52. *Id.* at 168.

53. *Id.* at 172-73 (Abrahamson, J., concurring).

54. *Id.* at 168. The statute read:

> 101.17. *Machines and boilers, safety requirement.* No machine, mechanical devise, or steam boiler shall be installed or used in this state which does not fully comply with the requirements of the laws of this state enacted for the safety of employees and frequenters in places of employment and public buildings and with the orders of the department adopted and published in conformity with §§ 101.01 to 101.25. Any person violating this section shall be subject to forfeitures provided in § 101.02(12) and (13).

Id. at 168-69 n.2 (quoting TEX. CODE ANN. § 101.17 (West 1986)).

55. *Id.* at 172.

56. *Id.* at 170.

57. *Id.*

58. *Id.* at 172.

59. *See* Decker, *supra* note 18, at 496-502 (providing statutory structure to regulate employment-at-will in Pennsylvania); Squire, *supra* note 1, at 668-71 (utilizing prima facie tort doctrine for wrongful discharge cases).

60. PERRITT, *supra* note 20, at 432.

wrongful dismissal claim based on a violation of public policy, the employee must prove four elements: (1) the existence of a clear and substantial public policy (clarity element); (2) jeopardy to that policy if employers are allowed to escape liability for terminating employees in circumstances such as those involving the plaintiff, and thus chill policy-linked conduct (jeopardy element); (3) actual conduct by the employee promoting the public policy, which caused the dismissal (causation element); and (4) lack of legitimate employer interest (other than the employment-at-will rule) justifying the dismissal (overriding justification element).[61] This approach provides a structure to the tort while giving courts flexibility to balance the various interests involved. It also gives courts the ability to limit the possible sources of the public policy without giving up their discretion.

III. HISTORY OF PUBLIC POLICY EXCEPTION TO THE EMPLOYMENT-AT-WILL DOCTRINE IN PENNSYLVANIA

Pennsylvania law first embraced the employment-at-will doctrine in *Henry v. Pittsburgh & L.E.R. Co.*[62] In *Henry*, the plaintiff's employer fired the plaintiff, Henry, from his position as a traveling passenger-agent after investigating financial discrepancies in the passenger-ticket department.[63] Even though the plaintiff was cleared of any wrongdoing, he was not reinstated.[64] In upholding the employer's power of discharge,

61. *Id.* Professor Perritt states that this approach requires a balancing of the employer's economic interest in running his business against the employee's interest in employment. *Id.* Without any additional interest asserted by the employee, the employment-at-will doctrine tips the scales in favor of the employer. *Id.* Consequently, for the employee to succeed in the wrongful discharge claim, he or she must assert an additional societal interest strong enough to overcome the employment-at-will doctrine. *Id.* Even when the employee sets forth a societal interest, the employer is free to assert an additional justification for the dismissal that may result in a shift of the scales once again. *Id.*

62. 21 A. 157, 157 (Pa. 1891). Pennsylvania adheres to a presumption creating an employment-at-will relationship between employer and employee absent an express contract provision stating otherwise. Darlington v. General Elec., 504 A.2d 306, 309 (Pa. Super. Ct. 1986) ("[A]bsent a contract, employees may be discharged at any time, for any reason, or for no reason at all."); Geary v. United States Steel Corp., 319 A.2d 174, 176 (Pa. 1974) ("Absent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason."). In *Scott v. Extracorporeal, Inc.*, the Pennsylvania Superior Court stated that an employee can overcome the presumption by express contract, implied contract or additional consideration passing from the employee to the employer. 545 A.2d 334, 336 (Pa. Super. Ct. 1988); *see also* Martin v. Capital Cities Media, Inc., 511 A.2d 830, 841 (Pa. Super. Ct. 1986) (holding intent to alter at-will employment must be clearly stated to overcome presumption), *appeal denied*, 523 A.2d 132 (Pa. 1987); Veno v. Meredeth, 515 A.2d 571, 577 (Pa. Super. Ct. 1986) (examining ways to overcome presumption in favor of at-will employment), *appeal denied*, 616 A.2d 986 (Pa. 1992).

63. *Henry*, 21 A. at 157.

64. *Id.*

the Pennsylvania Supreme Court held that absent a contract guaranteeing employment, "questions of malice and want of probable cause have [nothing] to do" with an employer's decision to terminate an employee.[65] For eighty-three years, Pennsylvania courts consistently applied the employment-at-will doctrine. Then, in 1974, the Pennsylvania Supreme Court signaled a departure from the doctrine in *Geary v. United States Steel Corp.*[66] The plaintiff in *Geary*, a salesman of tubular products for an oil and gas company, was discharged after reporting to management possible defects in a new product.[67] The Pennsylvania Supreme Court upheld the discharge because the plaintiff violated company policy in by-passing his superiors when reporting his suspicions.[68] The court stated in dicta, however, that a wrongful discharge action *might* exist if the discharge of an at-will employee threatens a "recognized facet" of public policy.[69] Pennsylvania thus became the fifth state to

65. *Id.*

66. 319 A.2d at 176.

67. The plaintiff, Geary, was employed by United States Steel Corporation (USX). *Id.* at 175. Geary believed that one of the new products was defective and informed his superiors of the product's possible dangers. *Id.* After being instructed to "follow directions," Geary reported his suspicions to a vice president in charge of product sales. *Id.* Even though USX eventually withdrew the product from the market, USX nevertheless dismissed Geary. *Id.* Geary then brought an action seeking both punitive and compensatory damages. *Id.* The trial court granted the defendant's demurrer and the Pennsylvania Superior Court affirmed. *Id.*

68. *Id.* at 179-80. In a four to three decision, the Pennsylvania Supreme Court held that where a complaint indicates that an employer has a legitimate reason for discharging an employee and the discharge does not violate public policy, the employee cannot bring a wrongful discharge action. *Id.* at 180. The plausible reason for Geary's discharge was his disregard of company policy by bringing his complaint directly to the vice president of sales, thereby by-passing his immediate superiors. *Id.* at 179-80.

The *Geary* court recognized that since its prior decision in *Henry*, economic conditions had radically changed:

> The huge corporate enterprises which have emerged in this century wield an awesome power over their employees. It has been aptly remarked that
>
> > We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. For our generation, the substance of life is in another man's hands.

Id. (quoting F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951)). It was against this changing economic background that the court examined "judicial restrictions on an employer's power of discharge" and contemplated the possible acceptance of an exception to the employment-at-will doctrine. *Id.*

69. *Id.* at 180. The court stated that:

> It may be granted that there are areas of an employee's life in which his [or her] employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge

acknowledge a possible exception to the employment-at-will doctrine.[70]

Since *Geary*, the Pennsylvania Supreme Court has addressed the exception's validity twice, once in 1989 and again in 1990.[71] Both prior and subsequent to these decisions, federal and lower state courts in Pennsylvania have attempted to develop parameters for the exception in light of the Pennsylvania Supreme Court's narrow dicta in *Geary*.

A. *The Public Policy Exception as Developed by the Pennsylvania Courts*

1. *Development of the Public Policy Exception After Geary v. United States Steel Corp.*

Despite the Pennsylvania Supreme Court's qualified acceptance of the public policy exception, both state and federal courts in Pennsylvania interpreted *Geary* as endorsing an exception to the employment-at-will doctrine.[72] While developing this new common-law cause of ac-

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might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened. The notion that substantive due process elevates an employer's privilege of hiring and discharging his [or her] employees to an absolute constitutional right has long since been discredited.

Id. The court, however, refused to "define in [a] comprehensive fashion the perimeters of this privilege," stating that this case did not provide the opportunity to do so. *Id.*

70. Kramer, Comment, *supra* note 3, at 249. The four cases in which courts have previously recognized an exception to the employment-at-will doctrine are: Monge v. Beebe Rubber Co., 316 A.2d 549, 550 (N.H. 1974) (holding public policy violated when employee fired for refusing employer's sexual advances); Snyder v. Regents of the University of California, 109 Cal. Rptr. 506 (Cal. App. 1973) (holding public policy violated when employee discharged for budgetary restrictions); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding public policy violated when employee discharged for bringing workmen's compensation claim against employer); and Petermann v. International Brotherhood of Teamsters, Local 396, 344 P.2d 25, 27 (Cal. App. 1959) (holding public policy violated when employee dismissed for refusing to commit perjury). For a further discussion of *Monge*, *Frampton* and *Petermann*, see *supra* notes 22-31 and accompanying text.

71. *See* Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) (holding that equitable estoppel is not recognized exception to employment-at-will doctrine); Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 919 (Pa. 1989) (preventing plaintiffs from pursuing wrongful discharge claim due to failure to pursue exclusive remedy under Pennsylvania Human Relations Act for sexual harassment). For a discussion of *Clay* and *Paul* and their impact on Pennsylvania law, see *infra* notes 97-122 and accompanying text.

72. *See, e.g.*, Burkholder v. Hutchinson, 589 A.2d 721, 723 (Pa. Super. Ct. 1991) (concluding that *Geary* created public policy exception to employment-at-will rule); Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1025 (Pa. Super. Ct.) (same), *appeal denied*, 600 A.2d 539 (Pa. 1991); Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1179 (Pa. Super. Ct. 1989) (same); McGonagle v. Union Fidelity Corp., 556 A.2d 878, 881-82 (Pa. Super. Ct. 1989) (same), *appeal denied*, 575 A.2d 115 (Pa. 1990); Scott v. Extracorporeal, Inc., 545 A.2d 334, 341 (Pa. Super. Ct. 1988) (same); Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 260-61 (Pa. Super. Ct. 1985) (same); Cisco v. United Parcel Servs., Inc., 476 A.2d 1340, 1341 (Pa. Super. Ct. 1984) (same); Hunter v. Port Auth., 419 A.2d

tion, Pennsylvania courts narrowly construed the exception, applying it only in limited circumstances.[73] Thus far, only three Pennsylvania appellate courts have found that the dismissal of an at-will employee violated public policy.[74]

631, 635 n.5 (Pa. Super. Ct. 1980) (same); Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. Ct. 1978) (same); *see also* Hershberger v. Jersey Shore Steel Co., 575 A.2d 944, 946 (Pa. Super. Ct. 1990) (recognizing exception to doctrine in limited situations), *appeal denied*, 589 A.2d 691 (Pa. 1991); Rinehimer v. Luzerne City Community College, 539 A.2d 1298, 1301 (Pa. Super. Ct.) (holding that Pennsylvania law recognized public policy exception), *appeal denied*, 555 A.2d 116 (Pa. 1988).

When faced with a wrongful discharge action the Court of Appeals for the Third Circuit also interpreted *Geary* as creating a public policy exception. *See, e.g.*, Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1342 (3d Cir. 1990) (concluding that *Geary* established certain exceptions to employment-at-will rule), *cert. denied*, 499 U.S. 966 (1991); Woodson v. AMG Leisureland Ctrs., Inc., 842 F.2d 699, 701 (3d Cir. 1988) (finding that *Geary* was first case to recognize action for wrongful discharge); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (finding existence of public policy against requiring employees to submit to polygraph examinations). Unlike the Pennsylvania Superior Court, however, the Third Circuit did not immediately interpret the dicta in *Geary* as endorsing a public policy exception. In Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982), the Third Circuit opined that "the Pennsylvania Supreme Court has signaled its receptivity to the approach taken by other courts that 'public policy reasons' might warrant imposing a limitation on the employer's right to discharge." *Id.* at 918. The Third Circuit, however, like the *Geary* court, refused to set down parameters for the exception. *Id.* It was not until the Third Circuit decided Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983), that the court concluded that Pennsylvania law did allow a wrongful discharge action "where the employment termination [abridges] a significant and recognized public policy." *Id.* at 898.

In addition to the public policy exception, several Pennsylvania courts interpreted *Geary* as creating a specific intent to harm theory. *See, e.g.*, Mudd v. Hoffman Homes For Youth, 543 A.2d 1092, 1095 (Pa. Super. Ct. 1988) (holding that *Geary* created "intent to harm" theory); Darlington v. General Elec., 504 A.2d 306, 318 (Pa. Super. Ct. 1986) (same). However, subsequent to the Pennsylvania Supreme Court decisions in *Clay* and *Paul*, courts interpreting Pennsylvania law have concluded that the only viable exception to the employment-at-will doctrine is the public policy exception. *See* Rutherford v. Presbyterian-Univ. Hosp., 612 A.2d 500, 504-06 (Pa. Super. Ct. 1992) (confirming that *Clay* and *Paul* "clearly hold" that only exception to employment-at-will doctrine is violation of public policy); *Yetter*, 585 A.2d at 1026 (same). *But see* Booth v. McDonnell Douglas Truck Servs., Inc. 585 A.2d 24, 28 (Pa. Super. Ct.) (interpreting *Geary* as creating intent to harm theory with no mention of *Clay* or *Paul*), *appeal denied*, 597 A.2d 1150 (Pa. 1991).

73. *See, e.g.*, *Smith*, 917 F.2d at 1343 ("public policy exception to the employment at will doctrine has been interpreted narrowly"); *Burkholder*, 589 A.2d at 723 (stating that public policy exception remains extremely narrow exception); *Clay*, 559 A.2d at 918 ("Exceptions to this rule have been recognized in only the most limited of circumstances."). For a further discussion of the narrow interpretation of the public policy exception, see *infra* note 96.

74. Field v. Philadelphia Elec. Co., 565 A.2d 1170 (Pa. Super. Ct. 1989); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978). A third Pennsylvania case, Hunter v. Port Authority, 419 A.2d 631 (Pa. Super. Ct. 1980), while not upholding a cause of action based on a wrongful discharge theory, did discuss the public policy exception under the facts at hand. The most recent

Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division[75] was the Pennsylvania Superior Court's first attempt at defining the scope of the public policy exception.[76] In *Yaindl*, the Ingersoll-Rand Company employed the plaintiff as manager of customer service and as a technical service engineer.[77] The plaintiff was involved in an ongoing dispute with one of the managers, which resulted in his discharge for insubordination.[78] The *Yaindl* court analogized the public policy exception to the tort of intentional interference with the performance of a contract.[79] The court held that in determining whether to uphold a wrongful discharge cause of action, the court must weigh the employer's interests in running his or her business, the employer's reason for dismissing the employee, including the manner in which the dismissal occurred, and any public policies or societal interests against the employee's interest in earning a living.[80] By balancing these factors, a court can determine to

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case establishing a public policy exception is Kroen v. Bedway Security Agency, Inc., 633 A.2d 628 (Pa. Super. Ct. 1993). In *Kroen*, the Pennsylvania Superior Court held that the discharge of an employee for refusing to submit to a polygraph test gave rise to a wrongful discharge action. *Id.* at 633. The court followed the Third Circuit's reasoning expressed in Perks v. Firestone Tire and Rubber Co., 611 F.2d 1363 (3d Cir. 1969), and focused on the Pennsylvania statute proscribing the use of polygraph tests in employment situations. *Kroen*, 633 A.2d at 633 (citing 18 PA. CONS. STAT. ANN. § 7321 (1986)). For a discussion of *Perks*, see *infra* notes 156-63. For a discussion of *Hunter*, see *infra* notes 135-40 and accompanying text. For a discussion of *Field*, see *infra* noted 141-47 and accompanying text. For a discussion of *Reuther*, see *infra* notes 127-134 and accompanying text.

75. 422 A.2d 611 (Pa. Super. Ct. 1980).

76. *Id.* at 618. In examining the circumstances surrounding the plaintiff's dismissal, the court failed to "discern any clear public policy that was threatened by appellant's discharge." *Id.* at 620.

77. *Id.* at 614.

78. *Id.*

79. *Id.* at 618. The RESTATEMENT (SECOND) OF TORTS § 766 (1979) states that an action for intentional interference arises when a person "intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract . . . ." *Id.*

The court viewed the wrongful discharge cause of action as analogous to the tort of intentional interference with the performance of a contract. *Yaindl*, 422 A.2d at 618. Specifically, the court viewed as relevant to a wrongful discharge action five factors used in determining whether a party properly pleads an action for intentional interference: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; and (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other. *Id.* Consequently, the *Yaindl* court concluded that "the most useful way to view an action for wrongful discharge is as a particularized instance of a more inclusive tort of intentional interference with the performance of a contract." *Id.* While the court did not indicate exactly how these two torts are assimilated, it did use the basic structure of the intentional interference tort to mold the test set forth for the wrongful discharge cause of action. *Id.* at 620.

80. *Id.* at 620. In formulating the factors necessary in finding a wrongful

what extent public policy concerns curtail an employer's interest in running his or her business.[81] One commentator interpreted the *Yaindl* decision as transforming the public policy exception into a just cause requirement, necessitating an examination not only of traditional public policy concerns, but also of the employer's motives and manner of discharge.[82]

Four years after *Yaindl*, the Pennsylvania Superior Court in *Cisco v. United Parcel Services, Inc.*[83] redefined the *Yaindl* test.[84] United Parcel Service (UPS) employed the plaintiff, Cisco, as a delivery person.[85] A customer accused Cisco of theft and trespass while making a delivery, resulting in Cisco's termination.[86] Although a jury later acquitted Cisco of all charges, his repeated attempts at reinstatement failed.[87] The Pennsylvania Superior Court held that UPS did not violate public policy by discharging Cisco, and found that UPS had a legitimate business reason for terminating his employment.[88]

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discharge action, the *Yaindl* court discussed the theoretical basis for the wrongful discharge action as enunciated in *Geary*. *Id.* at 617. The court noted that a wrongful discharge action is based upon the recognition that while the employer has a strong interest in running his or her business efficiently and profitably, this interest must sometimes yield to other societal interests, including "the interest of the employee in making a living and the interest of the public in seeing to it that the employer does not act abusively and a proper balance between the employer's and the employee's interest is preserved." *Id.*

81. *Id.* at 617. The *Yaindl* court noted that "[t]he precise extent to which the employer's interest in running his [or her] business is limited by considerations of public policy cannot be stated but must be worked out on a case-by-case basis." *Id.* For a further discussion of the necessity of a case-by-case analysis of the doctrine, see *infra* note 93.

82. Kramer, Comment, *supra* note 3, at 251. Kramer states that the factors in *Yaindl* allow an employer to discharge an employee only for just cause. *Id.* In reaching this conclusion, Kramer reasons that in weighing the *Yaindl* court's factors, the employee's interest in maintaining his or her livelihood is generally viewed as stronger than the employer's interest in an arbitrary discharge. *Id.* Thus, a discharge that is not founded on just cause will generally tip the scale in favor of the employee. *Id.*

83. 476 A.2d 1340 (Pa. Super. Ct. 1984).

84. *See* Rinehimer v. Luzerne City Community College, 539 A.2d 1298, 1302 (Pa. Super. Ct.) ("the court, in effect, redefined the *Yaindl* balancing test"), *appeal denied*, 555 A.2d 116 (Pa. 1988). In formulating its own two prong test, the *Cisco* court examined the Pennsylvania court opinions in Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974); Ruether v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978); Hunter v. Port Authority, 419 A.2d 631 (Pa. Super. Ct. 1980); and Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611 (Pa. Super. Ct. 1980). *Cisco*, 476 A.2d at 1343.

85. *Cisco*, 476 A.2d at 1340-41.

86. *Id.* at 1341.

87. *Id.*

88. *Id.* at 1344. In *Cisco*, the plaintiff asserted a public policy encompassing a criminal defendant's right to a presumption of innocence. *Id.* at 1343. Cisco claimed that this public policy is nullified if an individual can lose his livelihood resulting from an accusation of wrongdoing. *Id.* The court held that the right to a presumption of innocence was connected with the right to a trial. *Id.* at 1342.

The *Cisco* court stated that the first inquiry in a wrongful dismissal action is whether the employer's action threatens a specific public policy.[89] If the employer's action threatens a specific public policy, the employer can escape liability only if the court determines that the employer had a separate, plausible and legitimate reason for terminating the employment.[90] One Pennsylvania court has suggested that the factors cited by the *Yaindl* court become relevant when considering the second prong of the *Cisco* test.[91]

After *Cisco*, the Pennsylvania Superior Courts considered the public policy exception to be a well settled principle of Pennsylvania employment law.[92] Courts have applied the exception on a case-by-case basis,[93] however, stressing the necessity of a clearly mandated public

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According to the court, Cisco could not carry over this presumption of innocence throughout his remaining life experience. *Id.* at 1344. Consequently, the court held that dismissal did not violate a recognized public policy. *Id.*

89. *Id.* at 1343.

90. *Id.* One court suggested that the second prong of the *Cisco* test is not absolute, and the ability of an employer to assert a separate and legitimate basis of dismissal depends on the strength of the public policy. Veno v. Merideth, 515 A.2d 571, 581 n.5 (Pa. Super. Ct. 1986) ("Some public policies are of greater importance than others. It follows that the more important the public policy implicated by the discharge, the harder it will be to assert a sufficient separate and legitimate business reason to justify the discharge."), *appeal denied*, 616 A.2d 986 (Pa. 1992); *see also* Scott v. Extracorporeal, Inc., 545 A.2d 334 (Pa. Super. Ct. 1988) (citing *Veno* in support of balancing test). In *Cisco*, the court held that an employer's interest in protecting his reputation by dismissing an employee accused of theft was a plausible and legitimate reason for dismissing that employee. 476 A.2d at 1344. This is true even though the employee was subsequently acquitted of all charges. *Id.*

91. Rinehimer v. Luzerne City Community College, 539 A.2d 1298, 1302 (Pa. Super. Ct.) ("It seems to us that the factors cited by the *Yaindl* court [aside, of course, from consideration of any public policy involved] now go to the second part of the *Cisco* test, that is, determining the legitimacy of the employer's interest."), *appeal denied*, 555 A.2d 116 (Pa. 1988).

92. *See* Field v. Philadelphia Elec. Co., 565 A.2d 1170, 1179 (Pa. Super. Ct. 1989) ("Since. . . *Geary*, it is now settled law in Pennsylvania that if the discharge of an employee-at-will threatens public policy, the employee may have a cause of action against the employer for wrongful discharge." (citations omitted)); *see also* McGonagle v. Union Fidelity Corp., 556 A.2d 878, 882 (Pa. Super. Ct. 1989) (viewing issue as "well settled"), *appeal denied*, 575 A.2d 115 (Pa. 1990). *Field* was one of the last cases decided by the Pennsylvania lower courts before the Pennsylvania Supreme Court revisited the issue of a wrongful discharge action.

93. *See* Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1344 (3d Cir. 1990) (recognizing that courts have been shaping public policy exception on case-by-case basis), *cert. denied*, 499 U.S. 966 (1991); *Field*, 565 A.2d at 1179 (same); *McGonagle*, 556 A.2d at 884 (same); *Rinehimer*, 539 A.2d at 1303 (same); *Scott*, 545 A.2d at 334 (same); Rossi v. Pennsylvania State Univ., 489 A.2d 828, 831-32 (Pa. Super. Ct. 1985) (same); Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 260 (Pa. Super. Ct. 1985) (same). The view that creating public policy exceptions requires case-by-case determinations originated in Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Division, 422 A.2d 611 (Pa. Super. Ct. 1980). *Id.* at 617. The *Yaindl* court, noting that the Pennsylvania Supreme Court had refused to lay down parameters to the public policy exception, stated

policy,[94] the overriding concern for the employer's interests[95] and the narrow scope of the public policy exception.[96]

2. *The Effects of Clay and Paul on Pennsylvania Case Law*

Fifteen years after the *Geary* decision, the Pennsylvania Supreme Court revisited the public policy exception in *Clay v. Advanced Computer Applications, Inc.*[97] The plaintiffs in *Clay*, a husband and wife, brought a wrongful discharge action against Advanced Computer Applications, alleging that Advanced Computer discharged Mary Clay for refusing sexual advances by one of the Advanced Computer's managing level employees.[98] Citing *Geary*, the *Clay* court recited the general proposition that Pennsylvania law does not recognize a common-law action for the discharge of an at-will employee.[99] The *Clay* court noted that courts have created exceptions only in the most limited circumstances where an employee's discharge threatens a clear mandate of public policy.[100] The *Clay* court did not consider the merits of the plaintiffs' wrongful discharge claims, however, because the plaintiffs were first required to file complaints under the Pennsylvania Human Rights Act, which covers sexual harassment claims.[101]

While briefly discussing the development of the public policy exception under Pennsylvania law, the *Clay* court failed to express its own view

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that "[t]he precise extent to which the employer's interest in running his [or her] business is limited by considerations of public policy cannot be stated but must be worked out on a case-by-case basis." *Id.*

94. *E.g.*, *Field*, 565 A.2d at 1179 (stating that violation of a clearly mandated public policy is essential element of public policy violation); *Turner*, 505 A.2d at 261 ("[T]he employee must show a violation of a clearly mandated public policy which 'strikes at the heart of a citizen's social right, duties, and responsibilities.' ").

95. *E.g.*, *Rinehimer*, 539 A.2d at 1302 ("[T]his court [in *Cisco*] made the determination that the employer's interest in the operation of his business is an overriding concern for the courts to consider in determining whether a cause of action will lie for wrongful discharge."); *Turner*, 505 A.2d at 261 ("It is clear that *Geary* [and] *Yaindl*. . . demonstrate a pattern of favoring the employer's interest in running its business.").

96. *See* Burkholder v. Hutchison, 589 A.2d 721, 723 (Pa. Super. Ct. 1991) (characterizing exception as "extremely narrow"); *Scott*, 545 A.2d at 342 ("Our state appellate courts have found a plausible wrongful discharge cause of action in only limited instances."); Martin v. Capital Cities Media, Inc., 511 A.2d 830, 842 (Pa. Super. Ct. 1986) (noting that "action for wrongful discharge is a narrow exception to the at-will rule and allows recovery only in limited instances"), *appeal denied*, 523 A.2d 1132 (Pa. 1987).

97. 559 A.2d 917 (Pa. 1989).

98. *Id.* at 918.

99. *Id.*

100. *Id.* The court cited Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978), as an example of the limited circumstances in which courts have recognized wrongful discharge actions. *Id.* For a discussion of *Reuther*, see *infra* notes 127-34 and accompanying text.

101. *Clay*, 599 A.2d at 919.

on the status of the public policy exception, making no reference to the "dicta" in *Geary* that purportedly created the exception.[102] In addition, the court failed to provide any additional guidance concerning the scope and application of the exception.

Chief Justice Nix, while concurring in the judgment, objected to the majority's premise that Pennsylvania law recognizes the public policy exception to the employment-at-will doctrine.[103] Chief Justice Nix did not read the court's language in *Geary* as creating a wrongful discharge action.[104] Instead, Chief Justice Nix viewed the *Geary* language as "gratuitous dicta" that could not have created a cause of action for wrongful discharge.[105] According to Chief Justice Nix, *Geary* clearly held that a wrongful discharge cause of action does not exist and considered the recognition of the exception to be "inimical to the continued existence of at-will employment."[106]

In contrast, Justice Zappala, in his concurrence, stated that *Geary* did create an action for wrongful discharge.[107] Nevertheless, he conceded that "the circumstances under which this Court will recognize a cause of action for wrongful discharge continue to evolve."[108]

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102. Of course, even a recognition that exceptions to the employment-at-will doctrine do exist can be interpreted as an acknowledgment of the exception's existence. The fact that both concurring opinions address the public policy exception seems to support this reading. *See Clay*, 599 A.2d at 922-23.

103. *Id.* at 922 (Nix, C.J., concurring). Chief Justice Nix, while concurring in the result, was concerned with the court's basic premise—that a common-law cause of action exists when the dismissal of an at-will employee contravenes public policy. *Id.* (Nix, C.J., concurring).

104. *Id.* at 923 (Nix, C.J., concurring).

105. *Id.* (Nix, C.J., concurring). Chief Justice Nix further asserted that because the plaintiffs refused to seek redress through the means required by statute, and because no other cause of action exists, the court was correct in dismissing the action. *Id.* (Nix, C.J., concurring). It is interesting to note that while not filing a separate opinion, Chief Justice Nix dissented in Geary v. United States Steel, 319 A.2d 174 (Pa. 1974).

106. *Clay*, 559 A.2d at 923 (Nix, C.J., concurring).

107. *Id.* at 923-24 (Zappala, J., concurring).

108. *Id.* (Zappala, J., concurring). Justice Zappala stated that "[t]he seminal case recognizing an exception to the at-will employment doctrine for wrongful discharge of an employee is *Geary*." *Id.* (Zappala, J., concurring). Justice Zappala's major concern with the majority opinion was the majority's ambiguity concerning the existence of the public policy exception. *Id.* (Zappala, J., concurring). Specifically, Justice Zappala was concerned with the court's statement that "we have never held that at-will employment terminations arising from sex discrimination are actionable at common law." *Id.* at 923 (Zappala, J., concurring). Justice Zappala stated that "[t]o the extent that the majority's statement is intended to foreclose the possibility that such a common law right would be recognized in Pennsylvania, I must object." *Id.* (Zappala, J., concurring). Noting the existence of a public policy favoring equal treatment of employees regardless of sex, Justice Zappala concluded that he "[would] not eliminate the possibility that our developing body of common law would encompass a cause of action for wrongful discharge arising out of sexual discrimination once that issue is before us." *Id.* at 924 (Zappala, J., concurring).

A year after *Clay* the Pennsylvania Supreme Court again examined the public policy exception in *Paul v. Lankenau Hospital*.[109] The plaintiff, Paul, was a Yugoslavian physician employed by Lankenau Hospital.[110] The hospital terminated Paul after allegations that Paul had taken five refrigerators from the hospital without permission.[111] Paul claimed that the hospital was equitably estopped from dismissing him for removing the refrigerators.[112] The question before the court in *Paul* was whether the doctrine of equitable estoppel qualified as a public policy exception to the employment-at-will rule.[113]

The court began its analysis by examining its prior decision in *Geary*, noting that the *Geary* court "specifically answered in the negative the central question of 'whether the time has come to impose judicial restraints on an employer's power to discharge.' "[114] The court then examined its most recent affirmation of *Geary* in *Clay*, noting the disagreement among the justices as to the existence and scope of the doctrine.[115] The *Paul* court concluded that "[t]he *Geary-Clay* analysis is dispositive of the instant case," holding that the doctrine of equitable estoppel is not an exception to the employment-at-will doctrine.[116] As in *Clay*, the Pennsylvania Supreme Court in *Paul* failed to define or provide parameters to the public policy exception. Instead, the court simply concluded, without further analysis, that "[a]n employee may be discharged with or without cause, and our law does not prohibit firing an employee for relying on an employer's promise."[117]

Due to the lack of discussion or analysis of the public policy exception under Pennsylvania law, the Pennsylvania Supreme Court's opinions in *Clay* and *Paul* seemingly questioned the validity of the public policy exception. Nevertheless, courts examining the exception subse-

109. 569 A.2d 346, 346 (Pa. 1990).

110. *Id.*

111. *Id.* at 347 & n.1.

112. *Id.* at 346.

113. *Id.* at 348.

114. *Id.* (quoting *Geary*, 319 A.2d at 176).

115. *Id.* at 348. The *Paul* court began its analysis by noting that the appellee and amicus urged the court to read *Geary* as "a breakthrough in the recognition of some restrictions on the doctrine of employment at-will." *Id.* The *Paul* court then quoted *Clay*, "[o]ur most recent affirmation of *Geary*," as holding that "[e]xceptions to the [employment-at-will] rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy." *Id.* (quoting *Clay*, 559 A.2d at 918). The court then cited Chief Justice Nix's concurring statement that opined that Pennsylvania does not recognize a wrongful discharge action. *Id.* Therefore, it does not appear that the *Paul* court was willing to either solidify the public policy exception or nullify the exception's existence under Pennsylvania law.

116. *Id.*

117. *Id.* The court concluded by stating that "[i]n the absence of a legally cognizable cause of action, the trial court erred in submitting the issue to the jury." *Id.* at 348-49.

quent to these decisions have interpreted *Clay* and *Paul* as continuing to recognize the exception.[118] In *Smith v. Calgon Carbon Corp.*,[119] for example, the Third Circuit stated that until the Pennsylvania Supreme Court clearly states otherwise, or until other persuasive evidence of a change in Pennsylvania law is found, the court was bound by its previous decisions recognizing the exception.[120] Interpreting *Paul* as supporting *Clay*'s implicit recognition of the public policy exception, the Pennsylvania Superior Court arrived at a similar conclusion in *Hershberger v. Jersey Shore Steel Co.*[121] Consequently, both federal courts and Pennsylvania state courts continued to recognize the public policy exception after *Clay* and *Paul*. These courts, however, have stressed both the necessity of a "violation of a clearly mandated public policy," and the extreme narrowness of the exception.[122]

3. *Sources of Public Policy for the Public Policy Exception to Employment-at-Will Doctrine*

An essential element in a wrongful discharge claim based on a public policy violation is the establishment of a "violation of a clearly mandated public policy which 'strikes at the heart of a citizen's social rights, duties, and responsibilities.' "[123] The Pennsylvania Supreme Court's failure to establish parameters for the public policy exception has complicated the determination of whether a purported public policy has suf-

118. *See, e.g.*, Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1025 (Pa. Super. Ct.) (citing *Clay* and *Paul* as supporting recognition of public policy exception), *appeal denied*, 600 A.2d 539 (Pa. 1991); Booth v. McDonnell Douglas Truck Serv., Inc., 585 A.2d 24, 27-28 (Pa. Super. Ct.) (making no mention of *Paul* or *Clay* while restating the policy espoused in *Geary*), *appeal denied*, 597 A.2d 1150 (Pa. 1991).

119. 917 F.2d 1338, 1343 (3d Cir. 1990), *cert. denied*, 499 U.S. 966 (1991).

120. *Id.* at 1343. While recognizing the viability of the public policy exception, the *Smith* court also acknowledged that courts have narrowly interpreted the public policy exception. *Id.* The "*Geary* [court] feared that the 'everpresent threat of suit might well inhibit the making of critical judgments by employers concerning employee qualifications.' " *Id.* (quoting *Geary*, 319 A.2d at 179).

121. 575 A.2d 944, 946-47 (Pa. Super. Ct. 1990), *appeal denied*, 589 A.2d 691 (Pa. 1991). The *Hershberger* court cited *Clay* for the proposition that Pennsylvania courts have recognized exceptions to the employment-at-will doctrine in limited circumstances, in which a significant public policy is threatened. *Id.* at 946 (citing Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989)). The *Hershberger* court then read the Pennsylvania Supreme Court's decision in *Paul* as supporting this proposition. *Id.* at 947.

122. Burkholder v. Hutchison, 589 A.2d 721, 723 (Pa. Super. Ct. 1991) ("Since its enunciation in *Geary*, the public policy exception to the rule precluding wrongful discharge claims in at-will employment situations had been developed further, but still remains an extremely narrow exception in the courts of Pennsylvania.").

123. Turner v. Letterkenny Fed. Credit Union, 505 A.2d 259, 261 (Pa. Super. Ct. 1985) (quoting Novosel v. Nationwide Insurance Co., 721 F.2d 894, 899 (3d Cir. 1983)). For a discussion of the requirement of a clearly mandated public policy, see *supra* note 33.

ficient support to satisfy the "clearly mandated test" and qualify as an exception.[124] The Pennsylvania Superior Court recognized this difficulty in *Cisco*, noting that "[a] clear statement of what public policy actually consists of is hindered by its varying manifestations."[125] Generally speaking, however, Pennsylvania courts establishing public policy exceptions have based the public policy on a combination of statutory and constitutional provisions.[126]

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124. The Pennsylvania Supreme Court in *Geary* stated that "this case does not require us to define in comprehensive fashion the perimeters of [the public policy exception], and we decline to do so." Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974). The court, however, indicated the type of situation in which the court might find a public policy exception—when an employer intrudes into an area of the employee's life in which the employer has no legitimate interest. *Id.*

In *Smith v. Calgon Carbon Corp.*, the Third Circuit interpreted the language in *Geary* as suggesting a limitation on the type of public policies that it would recognize. 912 F.2d at 1344-45. The *Smith* court stated that:

> where the conduct causing the discharge is workplace conduct as opposed to conduct in an area "of the employee's life in which his [or her] employer has no legitimate interest," *Geary* suggests that in the absence of such an endorsement, the Pennsylvania Supreme Court would be particularly reluctant to find an overriding public policy interest.

Id. at 1344 (quoting *Geary*, 319 A.2d at 180).

125. Cisco v. United Parcel Serv., Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984). The *Cisco* court looked to New Jersey law for guidance. *Id.* Under New Jersey law, valid sources of public policy include legislation, administrative rules, regulations or judicial decisions. *Id.* (citing Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980)). Absent legislation, however, the New Jersey Supreme Court stated that court must determine the existence of a public policy on a case-by-case basis. *Id.* (citing *Pierce*, 417 A.2d at 512).

Generally, courts may find public policies by identifying a specific provision of a statute, constitution, or administrative regulation, synthesizing a policy from several different statutes or constitutional provisions, identifying a right or mode of conduct covered by a traditional common-law cause of action or identifying a trade practice or well recognized professional standard. PERRITT, *supra* note 20 § 5.10, at 448 (3d ed. 1992). Plaintiffs will have varying success in establishing a public policy depending on which method of support the plaintiff utilizes. *Id.* The best method is finding support in a statute or constitutional provision. *Id.* § 5.11, at 448. Absent statutory, constitutional or professional guidelines to support the public policy, Professor Perritt opines that a plaintiff has a difficult case. *Id.* § 5.15, at 455. "In these circumstances, the court must decide what public policy is from its own perception of community values and consideration of competing interests." *Id.* Many courts are reluctant to play this role and instead leave it to the legislature to make such decisions. *Id.* at 456-57. Yet there is authority stating that courts are entitled to decide for themselves the parameters of public policy. *Id.* at 456. This approach is suggested by Professor Corbin: "In determining what public policy requires, there is no limit whatever to the 'sources' to which the court is permitted to go; and there is no limit to the 'evidence' that the court may cause to be produced." *Id.* (citing ARTHUR CORBIN, CORBIN ON CONTRACTS § 1375, at 1165 (1962)). Professor Perritt has noted, however, that "[t]he argument for a judge inferring public policy from the common law is especially strong when the rights involved already are recognized in other mature tort categories such as invasion of privacy." *Id.*

126. Scott v. Extracorporeal, Inc., 545 A.2d 334, 342 (Pa. Super. Ct. 1988) (stating that public policy must be articulated in statutory or constitutional pro-

The first case establishing a violation of a clearly mandated public policy was *Reuther v. Fowler & Williams, Inc.*,[127] in which the Pennsylvania Superior Court found the need for citizens to be freely available to serve on jury duty was the type of recognized facet of public policy to which the Pennsylvania Supreme Court in *Geary* alluded.[128] In *Reuther*, an at-will employee was fired for attending jury duty during working hours.[129] In determining that the employer's action constituted a public policy violation, the court relied on the broad dictum in *Geary* and the reasoning of *Nees v. Hocks*,[130] an Oregon Supreme Court decision.[131] The *Nees* court allowed an employee to recover damages resulting from her termination for attending jury duty.[132] The court reasoned that allowing such employer conduct would adversely affect the jury system and thwart the will of the community.[133] In addition to *Geary* and *Nees*, the *Reuther* court cited the Pennsylvania Constitution establishing trial by jury, and two state statutes governing the requirements for jury duty, in support of the proposition that the "jury system and jury service are of the highest importance to our legal process."[134]

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vision); *see also* Darlington v. General Elec., 504 A.2d 306, 318-20 (Pa. Super. Ct. 1986) (listing limited circumstances where violation of public policy established).

127. 386 A.2d 119 (Pa. Super. Ct. 1978).

128. *Id.* at 121. The *Reuther* court began by stating the general rule under Pennsylvania law that there "is no non-statutory cause of action for an employer's termination of an at-will employment relationship." *Id.* at 120 (citing Geary v. United States Steel Corp., 319 A.2d 174 (1974)). The court went on to note, however, that the Pennsylvania Supreme Court, along with courts from several other jurisdictions, has indicated that an employee might have a cause of action when the discharge violated a clear mandate of public policy. *Id.* (citing Petermann v. International Brotherhood of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973); Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974)).

129. *Id.* at 119-20. The plaintiff informed his employer that he had been selected to serve on jury duty and would be absent from work for a week. *Id.* at 121. The employer informed the plaintiff that he could be excused from jury duty by telling the judge he had already formed an opinion from reading the papers. *Id.* Nothing more was said about the matter until the plaintiff returned to work after serving for the week. *Id.* At that time, the plaintiff's employer fired him for not getting excused from serving. *Id.*

130. 536 P.2d 512 (Or. 1975).

131. *Reuther*, 386 A.2d at 120.

132. *Nees*, 536 P.2d at 516.

133. *Id.* The court reasoned that:

> [T]he jury system and jury duty are regarded as high on the scale of American institutions and citizen obligations. If an employer were permitted with impunity to discharge an employee for fulfilling her obligation of jury duty, the jury system would be adversely affected. The will of the community would be thwarted.

Id.

134. *Reuther*, 386 A.2d at 120. The court looked to Article I, Section 6 of the Pennsylvania Constitution, which reads: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." *Id.* (quoting PA. CONST., art. I, § 6). The court also looked to two separate statutes dealing with jury duty.

Shortly thereafter, the Pennsylvania Superior Court in *Hunter v. Port Authority*[135] upheld a cause of action against a public employer who denied employment to an individual because of a pardoned conviction. In *Hunter*, the plaintiff was denied employment as a bus driver because he was previously convicted of aggravated assault and battery.[136] In upholding a cause of action under the Pennsylvania Constitution, the *Hunter* court examined the legitimacy of governmental bans on employment of ex-criminal offenders, the Criminal History Record Information Act and article I, section 1 of the Pennsylvania Constitution.[137] The Superior Court held that "when a public employer denies employment to an individual because of his criminal record, the employer's denial of employment must be reasonably related to the furtherance of a legitimate public objective."[138] While the court did not uphold a cause of action based on a wrongful discharge theory, the court did compare the public policy involved with that asserted in *Reuther*.[139] The court stated that the substantial public policy in rehabilitating and reintegrating former offenders into society is at least as compelling as that involved in *Reuther*.[140]

The last case prior to the *Borse* decision in which the Pennsylvania Superior Court found a public policy violation is *Field v. Philadelphia Electric Co.*[141] The court held that public policy is violated when an employer fires an employee for "perform[ing] a duty he [or she] was required to perform under federal law."[142] In *Field*, the plaintiff reported violations of the Nuclear Regulatory Commission (NRC) regula-

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> "[S]ambiances for jury service . . . shall be deemed summonses of the court, and disobedience to them shall be considered the same as disobedience to any other summons of the court." [PA. CONS. STAT. ANN. tit. 17, § 1336 (Supp. 1977).] One who fails to appear when summoned for duty may be ordered to pay for every such default a sum not exceeding thirty dollars. [PA. CONS. STAT. ANN. tit. 17, § 1099 (1962).]

Id. at 120-21 (footnote omitted).

135. 419 A.2d 631 (Pa. Super. Ct. 1980).

136. *Id.* at 632. The plaintiff applied for employment as a bus driver for Allegheny County Port Authority. *Id.* Port Authority hired the plaintiff but later informed him that because he falsified his employment application, he would not go through training. *Id.* A question on the application requested information concerning any past felonies or misdemeanor convictions. *Id.* The plaintiff did not answer the question, being unsure as to the correct answer. *Id.* He explained to the Port Authority personnel assistant that while he was convicted on aggravated assault and battery, he was later unconditionally pardoned by the Governor. *Id.*

137. *Id.* at 634-35.

138. *Id.* at 638.

139. *Id.* at 635-36 n.5.

140. *Id.* The court went even further by stating that "the absence here of the competing due process and associational interests of the private employer in *Reuther* makes the public policy in this case more compelling." *Id.*

141. 565 A.2d 1170 (Pa. Super. Ct. 1989).

142. *Id.* at 1180.

tions as required by the Energy Reorganization Act of 1974 (ERA).[143] After a subsequent investigation by the NRC, Philadelphia Electric Company fired the plaintiff citing excessive absenteeism.[144] The NRC investigation confirmed the plaintiff's reports and concluded that Philadelphia Electric Co. discharged the plaintiff for reporting the NRC violations.[145] As evidence of an existing public policy, the Pennsylvania Superior Court relied heavily on the presence of the statutory duty to report NRC violations as well as the public interests furthered by compliance with the ERA.[146] The court concluded that Field stated a wrongful discharge action because "a statutory duty to act is present, since discharge was based on performance of that statutory duty, and since performance of that duty directly and clearly protects public safety."[147]

The difficulty in defining public policy is further evidenced by the reluctance of many courts to recognize wrongful discharge actions based on public policy violations.[148] Even when a plaintiff identifies statutes

143. *Id.* at 1173; *see* 42 U.S.C. § 5801 (1988).

144. *Field*, 565 A.2d at 1173.

145. *Id.* at 1173-74.

146. *Id.* at 1180. The court stated that "[f]ar from being unsubstantiated or unclear, the dangers to the public are well-recognized, substantiated, and matters of great public concern. . . . In addition, Field's action of reporting NRC regulations directly advanced the public concerns addressed by the ERA." *Id.* Consequently, the superior court concluded that the case was clearly in accord with its previous decision in *Reuther*. *Id.*

The defendants raised several arguments as to why the court should not create a new public policy. Citing Clay v. Advanced Computer Applications, Inc., 559 A.2d 917 (Pa. 1989), the defendant's argued that the presence of a statutory remedy precluded an independent violation for wrongful discharge. *Field*, 565 A.2d at 1181. The *Field* court noted that in *Clay*, the Pennsylvania Supreme Court held that Pennsylvania Human Rights Act (PARA), enacted to remedy discrimination, precluded a plaintiff from asserting a public policy violation based on a discharge in violation of the PARA. *Id.* The *Field* court distinguished the PARA from the ERA on two grounds. *Id.* First, the language in the PARA, unlike the ERA, indicates that the PARA procedures are mandatory in redressing a violation of the act. *Id.* Second, under the PARA, the legislature established a new administrative agency to deal solely with PARA violations. *Id.* The ERA, by contrast, does not designate any special agency to resolve disputes. *Id.*

Second, the defendants argued that the *Field* court, by allowing the wrongful discharge action, would be creating "a common law tort relying upon statutorily-created rights where violation of the rights are remedied by the statute." *Id.* at 1182. In response, the court stated that they were "merely using the ERA to find a stated public policy." *Id.*

147. *Field*, 565 A.2d at 1180. This analysis is similar to the statutory right/duty approach discussed in Section II of this Note. For a discussion of the statutory right/duty approach, see *supra* notes 47-58 and accompanying text.

148. As the Pennsylvania Superior Court in *Rossi v. Pennsylvania State University* suggested, "[a]lthough each case must be decided on its own facts, these cases [after Geary] are nonetheless revealing in that they evidence the great reluctance of the courts to recognize a right of action in an employee who alleged that he [or she] was terminated in contravention of public policy." 489 A.2d

and regulations supporting the alleged public policy, the Pennsylvania Superior Court has found them insufficient to support a recognized and significant public policy. For example, in *McGonagle v. Union Fidelity Corp.*,[149] the general counsel for an insurance company was fired for refusing to issue policies that questionably violated statutes and regulations of other jurisdictions.[150] The plaintiff relied upon Pennsylvania insurance laws and regulations requiring compliance with the laws of other jurisdictions as evidence of a public policy against violating the laws of other states.[151] The Pennsylvania Superior Court interpreted the Pennsylvania statutes as consisting of "general expression[s] of this Commonwealth's attempt to monitor a particular industry."[152] The court concluded that "[w]e do not equate such broad and general statements of policy violations to be tantamount to *Geary*'s 'clear mandate of public policy which strikes at the heart of a citizen's social right, duties and responsibilities' entitled to the status of a nonstatutory cause of action."[153] Thus, these cases demonstrate both the limited circumstances in which the Pennsylvania courts will find a public policy violation as well as the limited sources of public policy that the courts are willing to accept.[154]

B. *Third Circuit's Development of the Public Policy Exception*

Over the past fourteen years, the Third Circuit has taken a varied approach to interpreting Pennsylvania's public policy exception. At times, the Third Circuit has strictly adhered to the Pennsylvania courts' interpretation of the exception, while other times it has gone beyond the scope of the exception as developed by the Pennsylvania courts.[155] A

828, 837 (Pa. Super. Ct. 1985) (quoting Callahan v. Scott Paper Co., 541 F. Supp. 550, 563 (E.D. Pa. 1982)).

149. 556 A.2d 878 (Pa. Super. Ct. 1989), *appeal denied*, 575 A.2d 115 (Pa. 1990). In *McGonagle*, the plaintiff was named general counsel to Union Fidelity Life Insurance Company. *Id.* at 879. After three months as general counsel, the plaintiff learned that Union Fidelity was not complying with several state insurance regulations. *Id.* After reporting the violations to the executive vice president in charge of marketing, the plaintiff came across more questionable practices in several other states. *Id.* at 879-80. With knowledge of the financial consequences, the plaintiff decided to halt issuing policies in the states in which he felt the applications for such policies were illegal. *Id.* at 880. Shortly thereafter, the defendants asked for the plaintiff's resignation. *Id.*

150. *Id.* at 879-80.

151. *Id.* at 882-83.

152. *Id.* at 885. The court further stated that "[t]his point is consistent with the plaintiff's characterization of the insurance laws of this Commonwealth as being purely 'voluntary' in nature." *Id.*

153. *Id.*

154. *See also* Scott v. Extracorporeal, Inc., 545 A.2d 334, 341-42 (Pa. Super. Ct. 1988) (noting that Pennsylvania courts have carved out "very narrow exceptions" to employment-at-will doctrine and have found violations of public policy in only limited circumstances).

155. Part of this result may be due to the fact that the Third Circuit has

brief survey of the Third Circuit's decisions illustrates the court's varied approach.

The Third Circuit first interpreted and applied the public policy exception in *Perks v. Firestone Tire & Rubber Co.*[156] Firestone Tire & Rubber terminated the plaintiff, Perks, for refusing to submit to a polygraph examination.[157] Perks subsequently brought a wrongful discharge action claiming his termination violated public policy.[158] In examining Perks' claim, the Third Circuit first alluded to the Pennsylvania Supreme Court's broad language in *Geary*, which laid the theory for a wrongful discharge action.[159] The court then noted that the Pennsylvania Superior Court in *Reuther* utilized the *Geary* language in holding that an employer violates public policy by discharging an employee for attending jury duty.[160] Looking for a source of public policy prohibiting mandatory polygraph testing, the *Perks* court employed the Pennsylvania polygraph statute.[161] The statute prohibits employers from requiring polygraph examinations before individuals are hired or as a condition of continued employment.[162] Analyzing the public policy embodied in the

examined the public policy exception on a limited number of occasions ranging over a long period of time. With each new case brought before them, the Third Circuit has had to look at the new Pennsylvania cases that were decided since the Third Circuit last interpreted the exception. This explains the Third Circuit's disparate approach to the constitutional basis of public policy between its decisions in *Novosel v. Nationwide Insurance Co.* and *Borse v. Piece Goods Shop, Inc. Compare* Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983) (basing public policy on constitutional violations) *with* Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (interpreting Pennsylvania law as rejecting constitutional basis for public policy).

156. 611 F.2d 1363 (3d Cir. 1979).

157. *Id.* at 1364. Perks worked as a production coordinator, which required numerous contacts with regional suppliers. *Id.* After an investigation concerning employees accepting gratuities from suppliers, Perks was accused of accepting a prostitute provided to him by one of his supplier contacts. *Id.* Upon denying the charges, Perks' supervisor suggested that he submit to a polygraph examination to substantiate his story. *Id.* Within one week of refusing to submit to the test, Perks was terminated. *Id.*

158. *Id.*

159. The Third Circuit quoted the following language from *Geary*:

> It may be granted that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

Id. at 1365 (citing Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974)).

160. *Id.* at 1365 (discussing Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121 (Pa. Super. Ct. 1978)). *Reuther* was decided one year prior to *Perks*.

161. *Id.* at 1365-66.

162. The statute provides that: "A person is guilty of a misdemeanor of the second degree if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test." 18 PA. CONS. STAT. ANN. § 7321(a) (1986).

Pennsylvania polygraph statute, the Third Circuit concluded that this was the very type of public policy violation proscribed by the *Geary* and *Reuther* courts.[163]

The next Third Circuit case to address the public policy exception was *Bruffet v. Warner Communications, Inc.*,[164] where the court placed its first restriction on the scope of the wrongful discharge common-law remedy. The plaintiff, Bruffet, brought a wrongful discharge action based on the public policy asserted in the Pennsylvania Human Rights Act (PHRA), which prohibits handicap discrimination.[165] Unlike the statutorily based public policy asserted in *Perks*, the PHRA provided a remedy within its statutory structure.[166] The *Bruffet* court gave three reasons why the Pennsylvania courts would not create an additional public policy exception based on a PHRA violation.[167] First, based upon the language in *Geary*, the *Bruffet* court grouped Pennsylvania with those states that have taken a more constrictive view of the public policy exception.[168] Second, the court noted that allowing an independent common-law action would circumvent the administrative procedures of the PHRA mandated by the Pennsylvania legislature.[169] Finally, the court noted that the Pennsylvania cases allowing a wrongful discharge action have all involved instances in which no statutory remedy was available to the plaintiffs.[170] Therefore, the Third Circuit predicted that the Penn-

163. *Perks*, 611 F.2d at 1366. The Third Circuit discussed the purpose behind a similar statute in New Jersey where the New Jersey Supreme Court recognized the lack of "judicial control when an employer subjects his employee to a lie detector test and there is no licensing or other objective method of assuring expertise and safeguard in the administration of the test and the interpretation of its results." *Id.* at 1365 (citing State v. Community Distributors, Inc., 317 A.2d 697, 699 (N.J. 1974)). The New Jersey court went on to state that "[o]rganized labor groups have often expressed intense hostility to employer requirements that employees submit to polygraph tests which they view as improper invasions of their deeply felt rights to personal privacy and to remain free from involuntary self-incrimination." *Id.* at 1366.

164. 692 F.2d 910 (3d Cir. 1982).

165. *Id.* at 912. The PHRA states that "[i]t is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of . . . handicap or disability . . . ." 43 PA. CONS. STAT. ANN. § 952(b) (1982).

166. *See* 43 PA. CONS. STAT. ANN. § 951 et seq. (1982).

167. *Bruffet*, 692 F.2d at 918-19.

168. *Id.* at 918. The court focused on the Pennsylvania court's treatment of wrongful discharge claims based on retaliatory discharges. *Id.* The Pennsylvania Supreme Court in *Geary*, unlike other jurisdictions, refused to base a public policy exception on an employer's retaliatory discharge of an employee. *Id.* at 918 (citing Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974), and Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981), as supporting such an action).

169. *Id.* at 919.

170. *Id.* At that point in time, only three cases established public policy violations. *See* Perks v. Firestone Tire & Rubber, 611 F.2d 1363 (3d Cir. 1979) (holding that public policy violated when employee discharged for refusing to submit to polygraph test); Hunter v. Port Authority, 419 A.2d 631 (Pa. Super.

sylvania Supreme Court would not create a common-law remedy based on a PHRA violation.[171]

It is important to note that the *Bruffet* court, in reaching its decision, stressed the delicate task facing federal courts when interpreting state law. Chief Justice Sloviter underscored the court's role, stating that "[o]ne of the authentic obligations of federalism at the judicial level requires that we permit the state courts to decide whether and to what extent they will follow the emerging law."[172] This view of the Third Circuit's responsibility in interpreting state law was shortlived. Just over a year after *Bruffet*, the Third Circuit greatly expanded the scope of the public policy exception in *Novosel v. Nationwide Insurance Co.*[173]

The employer in *Novosel*, Nationwide Insurance Company, wished to support a bill in the Pennsylvania legislature and ordered its employees to assist in the lobbying efforts.[174] The plaintiff, Novosel, brought a wrongful discharge action after being terminated for refusing to provide assistance and for privately stating his opposition to the company's political stand.[175] The Third Circuit held that the employer violated public policy embodied in the First Amendment of the United States Constitution and Article I, Section 7 of the Pennsylvania Constitution.[176] Prior to *Novosel*, no Pennsylvania court had established a public policy violation solely on a constitutional provision.[177] Nevertheless, the Novosel court viewed the important interests in political and associa-

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Ct. 1980) (finding public policy violated when employer refused to hire pardoned criminal); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978) (holding that public policy violated when employee discharged for serving on jury duty). For a discussion of *Reuther* and *Hunter*, see *supra* notes 127-40 and accompanying text. For a discussion of *Perks*, see supra notes 156-63 and accompanying text.

171. *Bruffet*, 692 F.2d at 920. The court stated that "if Pennsylvania would not recognize a common law action for discharge on the basis of handicap or disability, it is less likely to recognize an action for failure to hire on the same basis." *Id.*

172. *Id.*

173. 721 F.2d 894 (3d Cir. 1983).

174. *Id.* at 896. Nationwide wished to support the passage of "The No-Fault Reform Act," then before the state legislature. *Id.* Nationwide instructed its employees to clip, copy, and obtain signatures on coupons that bore the insignia of the Pennsylvania Committee for No-Fault Reform, an organization actively supporting the bill. *Id.*

175. *Id.* The plaintiff also claimed that the employer breached an implied promise not to fire him so long as his performance was satisfactory. *Id.* Instead of filing an answer to Novosel's complaint, Nationwide Insurance Company filed a motion to dismiss, which the district court granted on the briefs alone. *Id.*

176. *Id.* at 899. The portion of the Pennsylvania Constitution on which the Third Circuit relied provides that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." *Id.* at 899 n.6 (citing PA. CONST., art. I, § 7).

177. *See* Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 120 (Pa. Super. Ct. 1978) (relying both on Pennsylvania Constitution and Pennsylvania statutes).

tional freedoms as necessitating the creation of an additional public policy exception.[178] Defining *Geary*'s requirement of a "clearly mandated public policy" as a policy which "strike[s] at the heart of a citizen's social rights, duties and responsibilities,"[179] the Third Circuit concluded that "an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim."[180] By allowing a plaintiff to rely strictly on a constitutional provision for evidence of the public policy, the Third Circuit greatly expanded the scope of the doctrine.[181]

Five years after the *Novosel* decision, the Third Circuit returned to the public policy exception in *Woodson v. AMF Leisureland Centers, Inc.*[182] *Woodson* involved the discharge of a barmaid who refused to serve liquor to a visibly intoxicated individual.[183] A Pennsylvania statute then in force prohibited employees from serving visibly intoxicated individuals.[184] The Third Circuit in holding that the employer's actions in *Woodson* constituted a public policy violation noted that previous cases establishing exceptions frequently involved situations in which the discharge resulted from the employee's compliance with or refusal to violate the law.[185]

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178. *Novosel*, 721 F.2d at 900. The Third Circuit interpreted the Pennsylvania Supreme Court decisions in *Geary* and Sacks v. Department of Public Welfare, 465 A.2d 981 (Pa. 1983) as extending "a non-constitutional claim where a corporation conditions employment upon political subordination." *Novosel*, 721 F.2d at 900. *Sacks* involved a public employee who was discharged for publically criticizing his employer. 465 A.2d at 981. The court stated that a public employer must caution against disciplining an employee where the harm to the employer is "more than speculative" and the employee exercises his protected First Amendment speech rights. *Id.* at 988.

179. *Novosel*, 721 F.2d at 899 (quoting Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981)).

180. *Id.*

181. *Id.* The scope and importance of the decision is particularly evident when noting that Novosel was a private employee and alleged no state action. *Id.* The *Novosel* court, however, did not view this as barring the plaintiff's cause of action. *Id.* The court opined that

> [t]he protection of important political freedoms, however, goes well beyond the question whether the threat comes from state or private bodies. The inquiry before us is whether the concern for the rights of political expression and association which animated the public employee cases is sufficient to state a public policy under Pennsylvania law.

Id.

182. 842 F.2d 699 (3d Cir. 1988).

183. *Id.* at 700-01.

184. 47 PA. CONS. STAT. ANN. § 4-493(1) (1969). The statute stated that:

> It shall be unlawful . . . for any licensee . . . or any employee, servant or agent of such licensee . . . to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated . . . or to habitual drunkards, or persons of known intemperate habits.

Id.

185. *Woodson*, 842 F.2d at 701-02 (citing Perks v. Firestone Tire & Rubber,

The Third Circuit, in its final opinion interpreting the public policy exception prior to *Borse*, once again placed overall limitations on the public policy exception. In *Smith v. Calgon Carbon Corp.*,[186] the plaintiff brought a wrongful discharge action claiming that he was dismissed for reporting to his supervisors environmental pollution caused by his employer's operations.[187] It was shortly before the Third Circuit decided *Smith* that the Pennsylvania Supreme Court in *Clay* and *Paul* cast doubt on the validity of the public policy exception.[188] Noting the problem posed by these decisions, the Third Circuit nevertheless stated that "in the absence of a *clear* statement by the Pennsylvania Supreme Court to the contrary or other persuasive evidence of a change in Pennsylvania law," it was bound by its previous decisions recognizing the exception.[189] The court then drew three general principles from previous cases interpreting the public policy exception. First, the Third Circuit noted that in each Pennsylvania Superior Court case that established a public policy exception, the public policy was embodied in a constitutionally or legislatively established prohibition, requirement or privilege.[190] In the absence of either constitutional or legislative endorsement, the Third Circuit found little evidence that a Pennsylvania court would recognize an interest as constituting a "clear mandate of public policy."[191] Second, the *Smith* court read *Geary* as displaying a re-

Co., 611 F.2d 1363 (3d Cir. 1979) (stating cause of action for wrongful discharge for refusing to submit to polygraph test); Shaw v. Russell Trucking Line, Inc., 542 F. Supp. 776 (W.D. Pa. 1982) (stating cause of action for reporting motor vehicle violations); McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D. Pa. 1979) (stating cause of action for refusing to violate antitrust laws); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978) (stating cause of action for serving on jury duty)).

186. 917 F.2d 1338 (3d Cir. 1990), *cert. denied*, 499 U.S. 966 (1991).

187. *Id.* at 1339-41.

188. For a discussion of *Clay* and *Paul*, see supra notes 97-122 and accompanying text.

189. *Smith*, 917 F.2d at 1343.

190. *Id.* at 1344. In Yetter v. Ward Trucking Corp., 585 A.2d 1022 (Pa. Super. Ct.), *appeal denied*, 600 A.2d 539 (Pa. 1991), the court stated that "in the few cases in which this Court has held that a claim had been stated for wrongful discharge based on the employer's violation of public policy, there existed a statute evidencing a legislative recognition of some public policy." *Id.* at 1026. In *Yetter*, the plaintiff failed to show a violation of any statutory or judicially recognized public policy. *Id.* at 1027.

In Hershberger v. Jersey Shore Steel Co., 575 A.2d 944 (Pa. Super. Ct. 1990), *appeal denied*, 589 A.2d 691 (Pa. 1991), the court held that pending legislation does not sufficiently support a finding of a clearly stated public policy. *Id.* at 947. The court noted that rather than supporting the plaintiff's argument, the legislature's failure to enact the legislation may demonstrate its determination that such a public policy does not exist. *Id.*

191. *Smith*, 917 F.2d at 1344. The court refused to decide whether a clear mandate of public policy could exist absent a legislative or constitutionally imposed directive. *Id.* The *Smith* court analogize the case to the *Geary* decision and seemed to establish another limitation on the public policy exception. *Id.* at 1345. The court stated that:

luctance to find a public policy violation where the conduct causing the discharge was not workplace conduct "in an area 'of an employee's life in which his employer has no legitimate interest.' "[192] Finally, the court stated that "a discharge may violate a 'clear mandate of public policy' if it results from conduct on the part of the employee that is required by law or from the employee's refusal to engage in conduct prohibited by law."[193] Examining the plaintiff's claim, the Third Circuit noted that the plaintiff neither claimed he was discharged for refusing to violate positive law, nor claimed he was discharged for performing a duty under positive law.[194] Thus, the court concluded that he could not sustain his wrongful discharge action.[195]

IV. INVASION OF PRIVACY AND DRUG TESTING

Faced with an increasing drug epidemic in our country, many employers are turning to drug testing as a method of protecting their interests in the workplace.[196] One of the most common methods of drug testing is urinalysis; its popularity is due to its relative ease of administration, low expense and its relative lack of federal and state regulation.[197] With the increased implementation of drug programs, however, employers face legal challenges to their programs based on claims of invasion of privacy, Fourth Amendment search violations, due process claims, negligence law and contract law.[198]

Drug testing in the private and public workplace raises serious pri-

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> Based on the *Geary* opinion, we would expect the Pennsylvania Supreme Court, before recognizing a cause of action on behalf of an employee who has complained to management about workplace conduct, to insist at least that the employee be charged either by the employer or by law with the specific responsibility of protecting the public interest and that he or she be acting in that role when engaging in the discharge causing conduct.

Id.

192. *Id.* at 1344 (citing Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974)).

193. *Id.*

194. *Id.* at 1345.

195. *Id.* The Third Circuit was "unable to distinguish [Smith's] claim from the one made and rejected in Geary's case." *Id.*

196. Mark A. Rothstein, *Kenneth M. Piper Lecture: Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.-KENT L. REV. 683 (1987). Drug abuse on the job can potentially be very costly to the private employer. "The costs of employee drug abuse borne by employers can be divided into six categories: (1) lost productivity; (2) accidents and injuries; (3) insurance; (4) theft and other crimes; (5) employee relations; and (6) legal liability." *Id.* at 688.

197. Anne M. Rector, Comment, *Use & Abuse of Urinalysis Screening in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1012 (1986).

198. Steven O'Neal Todd, Note, *Employee Drug Testing—Issues Facing Private Sector Employers*, 65 N.C. L. REV. 832, 833 (1987).

vacy issues.[199] The United States Supreme Court has recognized the privacy issues implicated in public sector drug testing, holding that urinalysis drug screening constitutes a Fourth Amendment search.[200] In the private sector, many employees challenge their employers' drug testing programs as an invasion of their privacy.[201] Some employees

199. The process of collecting a urine sample may implicate privacy interests. *See* Luck v. Southern Pacif. Transp. Co., 267 Cal. Rptr. 618, 625-27 (Cal. Ct. App.), *cert. denied*, 498 U.S. 939 (1990).

200. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (holding that United States Customs Service's drug testing program was subject to reasonableness requirement of Fourteenth Amendment); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 618 (1989). In *Skinner*, the Court found that privacy interests are implicated in several ways:

> It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
>
> > There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. at 617 (quoting National Treasury Employee Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *cert. granted*, 485 U.S. 903 (1988), *and aff'd in part and vacated in part*, 489 U.S. 656 (1989)). Thus, the *Skinner* court concluded that the collection and testing of urine are intrusions that constitute searches under the Fourth Amendment. *Id.* at 618.

201. *See Luck*, 267 Cal. Rptr. at 636 (holding that while privacy interests were implicated in testing, there was no public policy violation at time of violation as California Constitution was not interpreted to prohibit that type of testing); Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. Ct. App. 1989) (holding that state constitutional privacy interests not implicated when job applicant required to submit to drug testing where prior notice of testing given, collection process involved limited intrusiveness, and safeguards were in place to restrict access to results); Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170, 176 (N.J. Super. Ct.) (holding that invasion of privacy based on state and federal constitutions does not constitute clear mandate of public policy), *cert. granted*, 598 A.2d 897 (N.J. 1991), *and aff'd*, 609 A.2d 11 (N.J. 1992).

In Twigg v. Hercules Corp., 406 S.E.2d 52 (W. Va. 1990), the West Virginia Supreme Court held that a mandatory drug testing program violated public policy concerning an employee's right to privacy. *Id.* at 55. The court analogized the public policy based in the right of privacy to that based in polygraph examinations. *Id.* The West Virginia Supreme Court had previously held in Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984), that "it is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test, . . . [and the] public policy against such testing is grounded upon the recognition in this State of an individual's interest in privacy." *Id.* at 117. The *Twigg* court did recognize two situations in which the drug program will not violate public policy: where intrusion based upon "reasonable good faith objective suspicion" of employee drug use and where an employee's job involves public safety concerns. 406 S.E.2d at 55.

have specifically relied on the tort of intrusion upon seclusion, claiming that their employer's urinalysis program constituted a highly offensive invasion of their privacy, thus violating public policy.[202]

Pennsylvania law recognizes the tort of invasion of privacy as established in the *Restatement (Second) of Torts*.[203] The Pennsylvania Supreme Court has noted that "the existence of the tort of invasion of privacy in this Commonwealth cannot be denied."[204] However, neither federal nor state courts in Pennsylvania have directly or fully examined the relationship between drug testing and privacy interests in the private sector and, specifically, whether a tortious invasion of an employee's privacy qualifies as a public policy violation.

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202. *See* Leudtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1133 (Alaska 1989) (finding public policy protecting employee's privacy based on privacy clause in Alaska's Constitution, statutes protecting against employer intrusion and common-law tort of intrusion upon seclusion); *see also* Kelley v. Schlumberger Tech. Corp., 849 F.2d 41, 44 (1st Cir. 1988) (holding that direct observation of employees urinating resulted in invasion of privacy). *But see* Baggs v. Eagle-Picher Indus., Inc., 957 F.2d 268, 275 (6th Cir.) (holding that while plaintiff's program may constitute intrusion upon seclusion, Michigan law allows employers to use intrusive means to obtain employment related information), *cert. denied*, 113 S. Ct. 466 (1992); Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497, 500 (Tx. Ct. App. 1989) (holding that plaintiff's claim that employer's drug program intruded upon plaintiff's seclusion cannot stand because plaintiff consented to testing).

The right of privacy was first enunciated in 1890 by Samuel D. Warren and Louis D. Brandeis in their article, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). Since then, the tort of invasion of privacy has been broken down into four specific torts. According to the *Restatement (Second) of Torts*, one's right of privacy is violated by "(a) an unreasonable intrusion upon the seclusion of another, (b) an appropriation of the other's name or likeness, (c) unreasonable publicity given to the other's private life, (d) publicity that unreasonably places the other in a false light before the public." RESTATEMENT (SECOND) OF TORTS § 652A(2)(a)-(d) (1977).

The tort of intrusion upon seclusion is defined in the *Restatement*, which states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS, § 652B (1977).

203. In Vogel v. W. T. Grant Co., 327 A.2d 133 (Pa. 1974), the Pennsylvania Supreme Court adopted the tentative draft of the *Restatement (Second) of Torts*, viewing it as both "logical and precise" and recognizing that "[i]t is in accord with the common-law development of the tort of invasion of privacy in Pennsylvania." *Id.* at 136. While the Pennsylvania Supreme Court has not accepted the final draft of the *Restatement*, the Third Circuit predicted that if given the opportunity, the Pennsylvania Supreme Court would adopt the sections concerning the privacy torts. O'Donnell v. United States, 891 F.2d 1079, 1082 n.1 (3d Cir. 1989); *see also* Harris by Harris v. Easton Publishing Co., 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984) ("We believe that the Restatement most ably defines the elements of invasion of privacy as that tort has developed in Pennsylvania.").

204. Marks v. Bell Tel. Co., 331 A.2d 424, 430 (Pa. 1975); *see also Vogel*, 327 A.2d at 134 ("the existence of the right [of privacy] in this Commonwealth is now firmly established . . . despite the fact that its perimeter is not yet clearly delineated" (citations omitted)).

The first case to touch upon the relationship between a wrongful discharge action and an action based on the invasion of an employee's privacy is *Rogers v. International Business Machines Corp.*[205] In *Rogers*, an ex-employee brought an action against his former employer claiming wrongful discharge and invasion of privacy.[206] The defendant employer, IBM, dismissed the plaintiff after investigating his activities at the workplace.[207] The employer found that the employee's relationship with another employee "exceeded normal or reasonable business associations," and negatively affected his work performance.[208]

The United States District Court for the Western District of Pennsylvania first considered the plaintiff's wrongful discharge claim.[209] Rogers asserted that his termination was improperly based on an investigation into his private matters—matters in which his employer had no legitimate interest.[210] The court, however, found no "corporate impropriety" that violated public policy.[211] The district court determined that the employer acted reasonably in his investigation and subsequent employment action.[212] According to the district court, not only was the plaintiff involved in the investigation, but the allegations focused on his job performance, an area in which an employer has a legitimate interest.[213] The district court next examined the plaintiff's invasion of privacy claim, concluding that because the investigation was limited to interviews of employee's and examination of public records, the court could find no invasion of the plaintiff's privacy.[214] The court did not, however, consider whether a tortious invasion into the employee's pri-

205. 500 F. Supp. 867 (W.D. Pa. 1980).

206. *Id.* at 866. The plaintiff, John Rogers, was Pittsburgh Branch Manager for IBM. *Id.* He was employed for 14 years before being dismissed. *Id.*

207. *Id.* The employer's investigation focused on various areas including deviceness, business judgment, loyalty and personal conduct. *Id.*

208. *Id.*

209. *Id.* The court noted that Pennsylvania law presumes an at-will relationship absent express contractual terms stating otherwise. *Id.* Because there was no evidence of either an express or implied contract between the parties, the court concluded that the parties created an at-will relationship. *Id.* at 869.

210. *Id.* at 869.

211. *Id.* The court stated that "[a] broad assertion that IBM acted intentionally, wrongfully and without justification does not meet the test of *Geary v. U. S. Steel Corp.*" *Id.*

212. *Id.*

213. *Id.* Citing *Geary*, the district court noted that "an employer has a legitimate interest in 'preserving harmony among its employees and in preserving its normal operational procedures from disruption.' " *Id.*

214. *Id.* at 870. The court focused on section 652A(2) of the *Restatement (Second) of Torts*, which lists four ways in which a person's privacy is invaded: (1) intrusion upon seclusion of another's privacy; (2) appropriation of another's name or likeness; (3) unreasonable publicity of private matters; (4) publication which places one in a false light. *Id.* Initially focusing on the tort of intrusion upon seclusion, the court found no invasion of privacy based on this theory. *Id.* The investigation was limited to the examination of company records and the interview of full time company employees. *Id.* The court also found no publica-

vacy would constitute the violation of a clearly mandated public policy under Pennsylvania law.[215]

While *Rogers* is the only case under Pennsylvania law to examine the relationship between the tort of invasion of privacy and the public policy exception, *Hershberger v. Jersey Shore Steel Co.*[216] is the only Pennsylvania case to consider whether drug testing raises sufficient public policy concerns required for the public policy exception. In *Hershberger*, the plaintiff employee was asked to resign after failing two consecutive drug tests.[217] The plaintiff then obtained a sample of his urine which had previously tested positive and subjected it to a more reliable test.[218] The sample tested negative.[219] After requesting reinstatement, Jersey Shore Steel told the plaintiff that he had resigned and would not be rehired.[220] The plaintiff then brought this action claiming that Jersey Shore Steel violated public policy by not confirming the first test with an alternative method of testing.[221] As evidence of the public policy, the plaintiff relied on: pending legislation in Pennsylvania that would require confirmatory testing before discharging an employee; existing legislation in eight other states that required additional testing by alternative methods; and expert testimony by physicians stating that they would not have confirmed the positive results using the identical testing procedure.[222] The Pennsylvania Superior Court, however, held that the evidence presented failed to support a "clear mandate in the form of public policy" and dismissed the plaintiff's wrongful discharge action.[223]

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tion of private activities because the plaintiff could not establish any publication. *Id.*

215. *Id.* at 868-70.

216. 575 A.2d 944 (Pa. Super. Ct. 1990), *appeal denied*, 589 A.2d 691 (1991).

217. *Id.* at 945. The tests were performed as part of a new employee 60-day probation period. *Id.* After failing the test, the plaintiff was given the option of either resigning or being fired. *Id.*

218. *Id.* The alternative test is known as a gas chromatography mass spectrometry. *Id.* In addition to testing the sample obtained from his employer, the plaintiff had a separate test performed on a sample collected the day after his resignation. *Id.* Both tests resulted in negative readings for marijuana. *Id.*

219. *Id.*

220. *Id.* The plaintiff's employer informed the plaintiff that if he were able to provide documentation demonstrating a flaw in the employer's testing procedure, the employer would place the plaintiff in a pool of applicants to be considered for subsequent positions. *Id.*

221. *Id.* at 946-47.

222. *Id.* at 947-48.

223. *Id.* at 947. The court did not view any of the evidence as persuasive grounds for finding a public policy in Pennsylvania. Dealing with the pending Pennsylvania legislation, the court stated that the legislature's inaction on the legislation acts like "a two-edged sword . . . undermin[ing] such an assertion counseling against the creation of a cause of action by judicial fiat for wrongful discharge in drug testing cases." *Id.* As to the eight other jurisdictions enacting such legislation, the court stated that it was "not persuaded to join in the creation of an exception to our at-will employment precept." *Id.* Finally the court

Consequently, while courts interpreting Pennsylvania law have touched upon the implications of private employer drug testing on public policy and employee privacy interests, Pennsylvania law in this area remains relatively undeveloped. The Third Circuit's decision in *Borse v. Piece Goods Shop, Inc.*[224] was the first time that a court fully examined these issues under Pennsylvania law.[225]

V. DISCUSSION & ANALYSIS

In 1990, Piece Goods Shop initiated a drug and alcohol program that required its employees to sign a consent form and submit to urinalysis screening and personal property searches.[226] Piece Goods Shop fired the plaintiff, Sarah Borse, after she refused to sign the consent form.[227] Ms. Borse brought a wrongful discharge action claiming that Piece Goods Shop fired her in retaliation for her refusal to comply with the drug testing program.[228] She claimed that her discharge violated public policy as contained in the First and Fourth Amendments of the United States Constitution.[229] The United States District Court for the Eastern District of Pennsylvania granted Piece Goods Shop's motion to dismiss, and Ms. Borse appealed.[230]

The Court of Appeals for the Third Circuit divided its opinion in *Borse* into two major sections.[231] In the first section, the court provided

stated that the testimony relied upon by the plaintiff "is anything but dispositive as to the unreliability of the [testing procedure used by Jersey Shore Steel Co.]" *Id.*

224. 963 F.2d 611 (3d Cir. 1992) (stating that Pennsylvania courts have not considered whether public policy is violated when employer tortiously invades privacy of an employee, resulting in employee's discharge).

225. *Id.* at 621-22. While the *Hershberger* court examined the public policy implication of confirmatory drug testing, no court had previously explored the relationship between employee drug testing in general and its privacy and public policy implications.

226. *Id.* at 613. The screening program initiated by Piece Goods was for drug use. *Id.* The personal property search involved personal property located on the shop's premises. *Id.*

227. *Id.* Ms. Borse worked for Piece Goods Shop for 15 years as a sales clerk. *Id.* On several occasions, Ms. Borse protested against the program alleging that it violated her right to privacy and right to be free from unwarranted searches and seizures. *Id.* Piece Goods Shop continued to insist on her cooperation, and after threatening several times to fire her if she continued to protest, Piece Goods Shop fired her on February 9, 1990. *Id.*

228. *Id.*

229. *Id.* The asserted public policy prohibits employers from violating their employees' privacy rights and freedom from unwarranted searches. *Id.* Ms. Borse sought compensatory damages for emotional distress, injury to reputation, loss of earnings and diminished capacity earnings. *Id.* She also sought punitive damages, claiming that the defendant's actions were willful and malicious. *Id.*

230. *Id.* The district court dismissed the plaintiff's claim for failing to state a claim upon which relief could be granted. *Id.*

231. *Id.* at 614, 618.

an overview of Pennsylvania's public policy exception, examining case law from both federal and state courts in Pennsylvania, and concluded that the violation of public policy is a recognized exception to the employment-at-will doctrine in Pennsylvania.[232] In the second section, the Third Circuit examined the Pennsylvania and United States Constitutions and the Pennsylvania common law for evidence of a clearly mandated public policy.[233] The Third Circuit concluded that a clearly mandated public policy exists prohibiting an employer from invading an employee's privacy.[234] The court based this public policy in the common-law privacy tort of intrusion upon seclusion.[235]

The Third Circuit in *Borse* began its overview of the public policy exception in Pennsylvania with an examination of the Pennsylvania Supreme Court's decisions in *Geary*, *Clay* and *Paul*.[236] After noting the Pennsylvania Supreme Court's implicit endorsement of the public policy exception in *Geary*,[237] the *Borse* court considered the impact of the subsequent supreme court decisions.[238] The *Borse* court noted that the Pennsylvania Supreme Court in *Clay*, while not controverting its dicta in *Geary*, stressed the narrowness of the public policy exception.[239] As to the Pennsylvania Supreme Court's decision in *Paul*, the *Borse* court opined that although the supreme court had "question[ed] the validity of the public policy exception, . . . it did not expressly inter it."[240] The *Borse* court concluded by noting that the Pennsylvania Supreme Court has not addressed the issue since its decision in *Paul*.[241]

The Third Circuit in *Borse* next surveyed the development of the public policy exception in the Pennsylvania Superior Court.[242] Focusing on cases in which the superior court upheld a wrongful discharge

232. *Id.* at 614-18.

233. *Id.* at 618-28.

234. *Id.*

235. *Id.* at 620-23. For a discussion of the *Borse* court's conclusions, see *infra* notes 236-301 and accompanying text.

236. *Borse*, 963 F.2d at 614-15.

237. *Id.* at 614. The *Borse* court noted that while the court in *Geary* did not apply the exception to the facts before it, subsequent courts construing Pennsylvania law interpreted *Geary* as endorsing the public policy exception. *Id.* at 615 (citing Woodson v. AMF Leisureland Ctrs., Inc., 842 F.2d 699 (3d Cir. 1988); Field v. Philadelphia Elec. Co., 565 A.2d 1170 (Pa. Super. Ct. 1989); Hunter v. Port Auth., 419 A.2d 631 (Pa. Super. Ct. 1980); Reuther v. Fowler & Williams, Inc., 386 A.2d 119 (Pa. Super. Ct. 1978)).

238. *Borse*, 963 F.2d at 614-15.

239. *Id.* at 614. In a footnote, the *Borse* court also noted, without comment, Justice Nix's dissenting opinion, which did not read *Geary* as creating a public policy exception. *Id.* at 615 n.1.

240. *Id.* at 615. For a discussion of other Pennsylvania court's interpretation of the effects of *Clay* and *Paul* on the *Geary* decision, see *supra* notes 118-122 and accompanying text.

241. *Borse*, 963 F.2d at 615.

242. *Id.* at 615-17.

action, the Third Circuit examined *Reuther*, *Hunter* and *Field*.[243] The *Borse* court recited the facts and holdings in each case, specifically scrutinizing the statutory and constitutional basis of the public policy at issue in each case.[244]

After examining the specific applications of the public policy exception, the *Borse* court shifted focus and examined the development of the parameters of the wrongful discharge action under Pennsylvania law.[245] Beginning with *Yaindl*, the *Borse* court described the apparent expansion of the exception into a "just cause requirement for discharging an at-will employee."[246] The Third Circuit noted that in analogizing a wrongful discharge claim to an action for intentional interference with a contract, the *Yaindl* court balanced the employer's interests in dismissal against the employee's interest in earning a living.[247] In an arbitrary discharge, this balancing would generally fall in favor of the employee's interest in earning a living and would result in a just cause requirement.[248]

The *Borse* court next recounted the return to the focus on public policy in *Cisco v. United Parcel Services, Inc.*[249] Instead of balancing the employee's interests in earning a living against the employer's asserted interests, the *Cisco* court determined whether the discharge threatened public policy.[250]

Finally, the Third Circuit noted that cases subsequent to *Cisco*, while retaining a focus on public policy, stressed the importance of a clearly stated public policy.[251] As an example, the court cited *Turner v. Letterkenny Federal Credit Union*,[252] where the Pennsylvania Superior Court held that a clearly mandated public policy is an essential element of a

243. *Id.* at 615-16. For a further discussion of *Reuther*, *Hunter* and *Field*, see *supra* note 123-47.

244. *Borse*, 963 F.2d at 615-16.

245. *Id.* at 616-17. The court distinguished this general approach from the case-by-case application of *Geary*. *Id.* at 616.

246. *Id.* at 616.

247. *Id.* The Third Circuit read *Yaindl* as recognizing that "the employer's interest in running its business as it sees fit must sometimes yield to the employee's interest in making a living and to the public's interest in ensuring that the employer does not act abusively." *Id.* (citing Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 422 A.2d 611, 617 (Pa. Super. Ct. 1980)).

248. *Id.* The Third Circuit noted that the *Yaindl* court's analysis appeared to expand greatly the public policy exception by apparently creating a just cause requirement, requiring the court to balance the employer's and employee's interests. *Id.* For a discussion of the *Yaindl* decision, see *supra* notes 75-82 and accompanying text. In interpreting *Yaindl* as establishing a just cause requirement, the *Borse* court cited Kramer, Comment, *supra* note 3, at 251. *Borse*, 963 F.2d at 616.

249. *Borse*, 963 F.2d at 616.

250. *Id.*

251. *Id.* at 617-18. For a complete discussion of *Cisco*, see *supra* notes 83-91 and accompanying text.

252. 505 A.2d 259 (Pa. Super. Ct. 1985).

wrongful discharge claim.[253] The *Borse* court summarized recent superior court decisions as embracing the public policy exception while emphasizing a narrow interpretation of the exception.[254]

After examining the Pennsylvania state court cases interpreting the public policy exception, the *Borse* court briefly surveyed the prior Third Circuit cases interpreting Pennsylvania law.[255] The *Borse* court noted that prior and subsequent to the Pennsylvania Supreme Court decisions in *Clay* and *Paul* the Third Circuit interpreted Pennsylvania law as recognizing a public policy exception.[256] The *Borse* court cited three reasons for interpreting *Geary* as recognizing a cause of action for wrongful discharge when the dismissal of an at-will employee violates a clear mandate of public policy.[257] First, in *Smith v. Calgon Carbon Corp.*,[258] decided after *Clay* and *Paul*, the Third Circuit stated that it would recognize a wrongful discharge cause of action absent a "*clear* statement" from the Pennsylvania Supreme Court rejecting the public policy exception.[259] Second, the Pennsylvania Supreme Court had not addressed the public policy exception since *Paul*, and the Third Circuit was unaware of any "persuasive evidence of a change in Pennsylvania law."[260] Finally, the Pennsylvania Superior Court after *Paul* continued to interpret Pennsylvania law as recognizing a wrongful discharge cause of action.[261]

After concluding that Pennsylvania recognizes a cause of action for wrongful discharge, the *Borse* court examined three possible sources of public policy—the United States Constitution, the Pennsylvania Constitution and Pennsylvania common law.[262] The court first examined the

253. *Borse*, 963 F.2d at 617. The *Turner* court stated that *Geary* "made clear that an essential element in permitting a cause of action for wrongful discharge was a finding of a clearly defined mandate of public policy." *Turner*, 505 A.2d at 260. The *Borse* court also cited Rinehimer v. Luzerne County Community College, 539 A.2d 1298 (Pa. Super. Ct. 1988) and McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989). *Borse*, 963 F.2d at 617.

254. *Borse*, 963 F.2d at 617. Summarizing the superior court decisions, the *Borse* court stated that while the superior court has continued to interpret Pennsylvania law as recognizing a public policy exception, "its most recent decisions emphasize that the exception is a narrow one." *Id.* (citing Burkholder v. Hutchison, 589 A.2d 721, 723 (Pa. Super. Ct. 1991) and Yetter v. Ward Trucking Co., 585 A.2d 1022, 1025 (Pa. Super. Ct.), *appeal denied*, 600 A.2d 539 (1991)). Consequently, "[t]he public policy violated must be clear and specific before the court will uphold the cause of action." *Id.*

255. *Id.*

256. *Id.* (citing Woodson v. AMF Leisureland Ctrs, Inc., 842 F.2d 699 (3d Cir. 1988); Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Bruffett v. Warner Communications, Inc., 692 F.2d 910 (3d Cir. 1982); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979)). For a discussion of the Third Circuit's interpretation of *Geary*, see *supra* note 72.

257. *Borse*, 963 F.2d at 617.

258. 917 F.2d 1338 (3d Cir. 1990), *cert. denied*, 499 U.S. 966 (1991).

259. *Borse*, 963 F.2d at 617 (quoting *Smith*, 917 F.2d at 1343).

260. *Id.*

261. *Id.*

262. *Id.* at 618-24.

United States Constitution for evidence of a public policy.[263] The plaintiff in *Borse* relied on the Third Circuit's decision in *Novosel* to support her claim that the United States Constitution can support a public policy in the absence of state action.[264] In *Novosel*, an employee was discharged for refusing to take part in his employer's efforts to lobby the Pennsylvania legislature and for opposing the employer's political positions.[265] Even though the plaintiff in *Novosel* did not claim state action, the Third Circuit nevertheless relied on the federal constitution as the source of public policy.[266] The *Borse* court, however, refused to expand *Novosel* beyond its facts.[267] The *Borse* court noted that the Pennsylvania Superior Court in recent cases had refused to look to constitutional provisions absent state action.[268] This fact, coupled with the Pennsylvania Superior Court's narrow interpretation of the public policy exception, led the *Borse* court to predict that the Pennsylvania Supreme Court would not look to the federal constitution for evidence of a public policy.[269]

Similarly, the *Borse* court predicted that the Pennsylvania Supreme Court would not rely on the Pennsylvania Constitution as evidence of a public policy.[270] According to the *Borse* court, while the Pennsylvania Supreme Court has recognized the right of privacy embodied in the Pennsylvania Constitution, it has not determined whether that right extends to private actors.[271]

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263. *Id.* at 618-20.

264. *Id.* at 618. Ms. Borse relied on both the First and Fourth Amendments to the United States Constitution. *Id.*

265. Novosel v. Nationwide Ins. Co., 721 F.2d 894, 896 (3d Cir. 1983).

266. *Id.* at 898-99. In upholding the wrongful dismissal action absent state action, the *Novosel* court noted that several Pennsylvania Superior Court cases implied public policies from constitutional provisions regardless of the presence of state action. *Id.* (citing Hunter v. Port Authority, 419 A.2d 631, 635 (Pa. Super. Ct. 1980) and Reuther v. Fowler & Williams, Inc., 386 A.2d 119, 121 (Pa. Super. Ct. 1978)). In each of these instances, no statutory remedies were available to the plaintiffs. *Id.* Consequently, because the plaintiff in *Novosel* also lacked statutory remedies, the Third Circuit followed the superior court in looking to the Federal Constitution for evidence of a public policy. *Id.* at 899.

267. *Borse*, 963 F.2d at 620.

268. *Id.* at 619 (citing Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1344 (Pa. Super. Ct. 1984), and Martin v. Capital Cities Media, Inc., 511 A.2d 830, 844 (Pa. Super. Ct. 1986)).

269. *Id.* at 620.

270. *Id.* While the plaintiff did not rely on the Pennsylvania Constitution to establish a public policy violation, the parties submitted supplemental briefs on the issue at the request of the court. *Id.*

271. *Id.* The right of privacy is protected in the Pennsylvania Constitution by Article 1, section 1. *Id.* (citing *In re* June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980)). Article 1, section 1 provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1. The *Borse* court noted

Concluding that the Pennsylvania Constitution cannot be utilized as a source of public policy, the *Borse* court turned to consider public policy embodied in the state common law.[272] Specifically, the court examined the privacy tort of tortious invasion of privacy.[273]

The *Borse* court focused its analysis on the specific privacy tort of "intrusion upon seclusion," as set forth in the *Restatement (Second) of Torts*, observing that "Pennsylvania recognizes a cause of action for tortious 'intrusion upon seclusion' ".[274] This type of invasion of privacy "consists solely of an intentional interference with [another's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable [person]."[275] The *Borse* court envisioned two ways in which an employer's urinalysis program might intrude upon the employee's privacy.[276] First, the court found that the particular manner in which the program is conducted might violate the employee's privacy right.[277] A substantial and highly offensive intrusion upon seclusion could result if the method used to collect the urine sample failed to give due regard to the em-

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that in interpreting this provision, the Pennsylvania Supreme Court has indicated that Article 1 was enacted to limit the *government's* ability to interfere with certain rights. *Borse*, 963 F.2d at 620 (citing Commonwealth v. National Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 592 (Pa. 1973)). Therefore, the Third Circuit predicted that the Pennsylvania Supreme Court would not look to the Pennsylvania Constitution for evidence of a public policy absent state action. *Id.*

272. *Borse*, 963 F.2d at 620.

273. *Id.*

274. *Id.*; *see* Marks v. Bell Tel. Co., 331 A.2d 424, 430 (Pa. 1975) (recognizing tortious intrusion upon seclusion as part of Pennsylvania law). The *Borse* court defined the tort of intrusion upon seclusion in accordance with the *Restatement (Second) of Torts* § 652B. *Borse*, 963 F.2d at 620. In a footnote, the *Borse* court noted that the Pennsylvania Supreme Court, while recognizing the tort as set forth in the tentative draft of the *Restatement*, has not recognized the *Restatement* in its final form. *Id.* at 622 n.8. However, the Third Circuit in *O'Donnell v. United States*, predicted that the Supreme Court would recognize the final draft when given the opportunity to do so. 891 F.2d 1079, 1082 n.1 (3d Cir. 1989). Therefore, the *Borse* court also interpreted Pennsylvania law as recognizing the tort of intrusion upon seclusion. *Borse*, 963 F.2d at 620.

In defining the parameters of the tort, the *Borse* court relied upon Harris v. Easton Publishing Co., 483 A.2d 1377 (Pa. Super. Ct. 1984), where the Pennsylvania Superior Court stated that the "tort may occur by (1) physical intrusion into a place where the plaintiff has secluded himself or herself; (2) use of the defendant's senses to oversee or overhear the plaintiff's private affairs; or (3) some other form of investigation or examination into plaintiff's private concerns." *Borse*, 963 F.2d at 621 (quoting *Harris*, 483 A.2d at 1383).

275. RESTATEMENT (SECOND) OF TORTS § 652B cmt (a). The *Restatement* defines the tort as: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

276. *Borse*, 963 F.2d at 621.

277. *Id.*

ployee's privacy.[278] This was the basis on which the United States Supreme Court held that the collection of urine constituted a Fourth Amendment search under the United States Constitution.[279] Second, because urinalysis can reveal a number of private medical facts about an employee, a reasonable person might consider it a highly offensive invasion of his or her privacy.[280]

Having determined that an employer's drug program may violate an employee's privacy, the *Borse* court addressed whether "a discharge related to an employer's tortious invasion of an employee's privacy violates public policy."[281] Because no Pennsylvania court had specifically addressed the issue, the *Borse* court relied upon the Pennsylvania federal district court decision in *Rogers v. International Business Machines Corp.*[282] In *Rogers*, the plaintiff claimed that his employer violated his privacy by investigating personal matters in which the employer had no interest.[283] The *Rogers'* court examined the record to determine whether the plaintiff's employer intruded upon his employee's seclusion.[284] The *Borse* court predicted that the Pennsylvania Supreme Court would follow the same approach and examine the record concerning the alleged invasion of privacy.[285] If the Pennsylvania Supreme Court "determined that the discharge was related to a substantial and highly offensive invasion of

278. *Id.* (citing Kelley v. Schlumberger Technology Corp., 849 F.2d 41 (1st Cir. 1988) (holding that observing employee urinating invaded employee's privacy)). First, the *Borse* court observed that the collection of urine "clearly implicates 'expectations of privacy that society has long recognized as reasonable.'" *Id.* (quoting Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989)). Next, the court recognized that many drug testing programs involve monitoring the urine collection to ensure that the employee does not tamper with the sample. *Id.* The *Borse* court concluded that "[m]onitoring collection of the urine sample appears to fall within the definition of an intrusion upon seclusion because it involves the use of one's senses to oversee the private activities of another." *Id.*

279. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).

280. *Borse*, 963 F.2d at 621 (quoting *Skinner*, 489 U.S. at 617). The court noted that urinalysis can reveal that a person is epileptic, pregnant or diabetic. *Id.* Thus, "[a] reasonable person might well conclude that submitting urine samples to tests designed to ascertain these types of information constitutes a substantial and highly offensive intrusion upon seclusion." *Id.* These types of privacy invasions also apply to a personal property search because the search may be conducted in a way that invades the employee's privacy by revealing personal matters not related to the workplace. *Id.*

281. *Id.* at 621-22.

282. 500 F. Supp. 867 (W.D. Pa. 1980). For a discussion of the *Rogers* decision, see *supra* notes 205-15 and accompanying text.

283. *Rogers*, 500 F. Supp. at 870.

284. *Id.* After examining the record, the court in *Rogers* found that the employer's actions were reasonable and did not intrude upon the employee's seclusion. *Borse*, 963 F.2d at 622. Therefore, the *Rogers* court found no public policy violation. *Id.*

285. *Borse*, 963 F.2d at 622. In examining the record, the court would look at the surrounding facts and circumstances. *Id.* This approach appears consistent with the test developed in *Cisco*, which emphasized the need to examine the

the employee's privacy, [the *Borse* court] believe[d] that [the Pennsylvania Supreme Court] would conclude that the discharge violated public policy."[286]

Next, the *Borse* court distinguished *Hershberger v. Jersey Shore Steel Co.*,[287] where the Pennsylvania Superior Court refused to recognize a public policy requiring employers to perform confirmatory tests subsequent to a positive result from the employee's drug test.[288] While the district court in *Borse* interpreted *Hershberger* as holding "sub silentio" that no public policy existed against employee drug testing, the Third Circuit refused to read the Pennsylvania Superior Court's decision as "foreclosing the possibility that, under some circumstances, an employer's urinalysis program may violate public policy."[289] Instead, the *Borse* court interpreted *Hershberger*'s silence as to the public policy implications of employee drug testing as neither endorsing nor prohibiting a public policy against employee drug testing.[290]

After concluding that the Pennsylvania Supreme Court would recognize a public policy violation stemming from an employer's invasion

surrounding circumstances. *Id.* (citing Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984)).

286. *Id.* The *Borse* court found further support for its prediction in the Pennsylvania Supreme Court's decision in *Geary*, where the court stated:

> that there are areas of an employee's life in which his employer has no legitimate interest. An intrusion into one of these areas by virtue of the employer's power of discharge might plausibly give rise to a cause of action, particularly where some recognized facet of public policy is threatened.

Id. at 622 (quoting Geary v. United States Steel Corp., 319 A.2d 174, 180 (Pa. 1974)).

287. 575 A.2d 944 (Pa. Super. Ct. 1990). For a further discussion of *Hershberger*, see *supra* notes 216-23 and accompanying text.

288. *Borse*, 963 F.2d at 622. The *Borse* court stated that:

> The sole issue before the [*Hershberger*] court was whether a clear mandate of public policy prohibits a private employer from discharging an employee on the basis of a positive drug test without confirming the results of the initial drug test by another, scientifically distinct test. As evidence that such a public policy exists, plaintiff argued that: (1) other states had enacted legislation requiring confirmatory testing; (2) Pennsylvania was then considering similar legislation; and (3) the federal and state courts had criticized the use of unconfirmed tests.

Id.

289. *Id.* at 622-23. In *Hershberger*, the court refused to recognize a public policy against discharge of an employer who failed a drug test without first conducting a confirmatory test. 575 A.2d at 948-49. The district court in *Borse* read *Hershberger* as implicitly holding, *sub silentio*, that there is no public policy in Pennsylvania prohibiting an employer from requiring its employees to submit to a urinalysis. *Borse*, 963 F.2d at 622.

290. *Borse*, 963 F.2d at 622-23. The Third Circuit in *Borse* found that the trial court's conclusion was not clear, and consequently viewed *Hershberger* differently. *Id.* The *Borse* court stated that the *Hershberger* court "may have elected to dispose of the case adversely to the plaintiff on the basis of the sole question presented without reaching the more difficult issue (the one before us now) that appears not to have been presented." *Id.* at 622.

of an employee's privacy, the *Borse* court surveyed decisions in other jurisdictions to determine what test should be applied to decide whether a program is highly offensive to a reasonable person.[291] The court noted that of the handful of courts that have addressed the issue, the majority balance the employer's interest in a drug free workplace against the employee's privacy interest.[292] The *Borse* court found the balancing test to be consistent with Pennsylvania law, because previous Pennsylvania Superior Court cases establishing public policy exceptions have stressed the need to examine the surrounding circumstances in determining whether public policy is violated.[293] Consequently, the *Borse* court concluded that the Pennsylvania Supreme Court would utilize a balancing test to determine whether an employer's drug and alcohol policy violates the employee's right to privacy.[294] The test "balances the employee's privacy interest against the employer's interest in maintaining a drug-free workplace in order to determine whether a reasonable person would find the employer's program highly offensive."[295]

The final issue the *Borse* court addressed was whether the Pennsylvania Supreme Court would consider safety factors and individual suspicion when applying the interest balancing test.[296] The *Borse* court noted that these restrictions were originally imposed upon public employers,[297] and that Pennsylvania court decisions have demonstrated a

291. *Id.* at 623-26.

292. *Id.* at 623-24; *see* Leudtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1133-34 (Alaska 1989) (utilizing balancing test); Twigg v. Hercules Corp., 406 S.E.2d 52, 55-56 (W. Va. 1990) (same); Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11, 20 (N.J. 1992) (same). The one case the *Borse* court examined that did not employ a balancing test was Jennings v. Minco Tech. Labs, Inc., 765 S.W.2d 497 (Tex. Ct. App. 1989). In *Jennings*, the Texas Court of Appeals upheld the drug testing program for several reasons. *Id.* at 500-02. First, the Texas court refused to find an additional public policy exception to the very narrow exception previously created under Texas law. *Id.* at 500-01. The court also held that because the employee was required to consent before any of the testing was completed, the employer "threaten[ed] no *unlawful* invasion of any employee's privacy interest." *Id.* at 502.

293. *Borse*, 963 F.2d at 625 (citing Cisco v. United Parcel Services, Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984)). The *Borse* court also noted that while two of the three Pennsylvania cases recognizing public policy exceptions to the employment-at-will doctrine relied partly on statutes, "the Pennsylvania courts have also recognized other sources as competent evidence of public policy." *Id.* The court stated that, "[m]ore importantly, under Pennsylvania law an employee's consent to a violation of public policy is no defense to a wrongful discharge action when that consent is obtained by the threat of dismissal." *Id.* (citing Leibowitz v. H.A. Winston Co., 493 A.2d 111 (Pa. Super. Ct. 1985)). The *Borse* court commented on the issue of consent to distinguish Pennsylvania law from the Texas law used in deciding in *Jennings*. *Id.*

294. *Id.* The *Borse* court stated that "determining whether an alleged invasion of privacy is substantial and highly offensive to the reasonable person necessitates the use of a balancing test." *Id.*

295. *Id.*

296. *Id.*

297. *Id.* There is a difference between an action against a private employer

" 'pattern of favoring the employer's interest in running its business' and a willingness to define that interest broadly."[298] Thus, the Third Circuit opined that while the Pennsylvania Supreme Court might include these factors in its balancing test, the supreme court would not "require private employers to *limit* urinalysis programs or personal property searches to employees suspected of drug use or to those performing safety-sensitive jobs."[299]

Finally, in applying the balancing test to the facts in *Borse*, the Third Circuit concluded that it could not hold that Ms. Borse's discharge violated public policy because she failed to explain how the drug testing program tortiously invaded her privacy.[300] However, because the court could conceive of two ways in which a drug testing program could tortiously invade an employee's privacy, the Third Circuit remanded the case to allow Ms. Borse leave to amend her complaint.[301]

VI. IMPACT OF BORSE AND EMPLOYER GUIDELINES

The Third Circuit's decision in *Borse* must be examined in the context of the development of the public policy exception in Pennsylvania. Because Pennsylvania law is controlling, the Third Circuit was required to predict how the Pennsylvania Supreme Court would decide the case if it was before the Pennsylvania Supreme Court.[302] Therefore, the his-

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and an action against a public/governmental employer. *Id.* at 625-26. Claims against private employers are based upon the tort of invasion of privacy. *Id.* This requires the court to determine whether the program was substantial and highly offensive. *Id.* Claims against the public/governmental employers, on the other hand, are based upon Fourth Amendment principles. *Id.* Therefore, the *Borse* court concluded that "we do not believe that the Pennsylvania Supreme Court would simply transpose Fourth Amendment limitations on public employers to urinalysis programs or personal property searches conducted by private employers." *Id.* at 626.

298. *Id.* at 626 (quoting Turner v. Letterkenny Federal Credit Union, 505 A.2d 259, 261 (Pa. Super. Ct. 1985)).

299. *Id.* at 625.

300. *Id.* at 626.

301. *Id.* For a discussion of the ways that an employer's drug testing program could invade the employee's privacy, see *supra* notes 276-80 and accompanying text.

302. *Borse*, 963 F.2d at 614. The Third Circuit noted that:

> Because the Pennsylvania Supreme Court has not addressed the question whether discharging an at-will employee who refuses to consent to urinalysis and to searches of his or her personal property located on the employer's premises violates public policy, we must predict how that court would resolve the issue should it be called upon to do so.

Id. at 613-14. Concerning the decisions by the Pennsylvania Superior Court, the Third Circuit in *Borse* stated that "[a]lthough decisions by Pennsylvania's intermediate appellate courts are not conclusive in predicting how the state's highest court would decide an issue, they suggest how that court might decide and may constitute presumptive evidence of state law in appropriate circumstances." *Id.*

In his statement denying rehearing en banc, Justice Hutchinson parts with the majority in *Borse* on these very grounds. *Id.* at 626-28 (Justices Greenburg

tory of the public policy exception in Pennsylvania must be examined in light of the Pennsylvania Supreme Court's views concerning the employment-at-will doctrine and the public policy exception. There are two aspects of the court's opinion in which the Third Circuit either failed fully to support its conclusions from the history of the public policy exception in Pennsylvania, or else failed to give sufficient guidance to employers attempting to establish drug testing programs.

The first problem with the Third Circuit's opinion in *Borse* is that the court failed sufficiently to analyze and support its conclusion that the Pennsylvania Supreme Court would recognize the tortious invasion of privacy as a clear mandate of public policy.[303] As previously mentioned, the Pennsylvania Supreme Court has expressed a reluctance to disregard the employment-at-will doctrine, noting that exceptions to the rule "have been recognized in only the most limited of circumstances."[304] Even the Pennsylvania Superior Court has emphasized the narrowness of the exception,[305] the need for a clearly mandated public policy[306] and the strong interest of the employer in running his or her business as he or she sees fit.[307]

As evidence of a clearly mandated public policy, the Third Circuit relied solely upon the common-law tort of intrusion upon seclusion and

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and Altino join in the dissent; Justice Nygaard would also grant rehearing). Justice Hutchinson noted that:

> The [majority] concedes that the public policy on which it relies is not expressed in either the Pennsylvania Constitution, Pennsylvania's statutory law or in existing Pennsylvania Supreme Court or Superior Court decisions concerning employment at will. This is a diversity case. Therefore, this Court is bound by state law. Judicial notions of public policy are no substitute for law. I am therefore unable to reconcile the Court's opinion with the requirement that federal courts follow state law in deciding diversity cases.

Id. at 627.

303. For a discussion of the *Borse* court's conclusion that the Pennsylvania Supreme Court would recognize the tortious invasion of privacy as a clear mandate of public policy, see *supra* notes 281-90 and accompanying text.

304. Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989). For a discussion of the Pennsylvania Supreme Court cases dealing with the public policy exception, see *supra* notes 62-71 and accompanying text. Justice Hutchinson viewed the Pennsylvania Supreme Court's narrow interpretation of the public policy exception to mean "that specific exceptions should be created and defined by the Supreme Court of Pennsylvania." *Borse*, 963 F.2d at 627.

305. For a discussion of the narrowness of the exception, see *supra* note 96.

306. For a discussion of the meaning of a clearly mandated public policy and an examination of the sources of public policy, see *supra* notes 32-61 and accompanying text.

307. *Borse*, 963 F.2d at 626. The *Borse* court recognized a strong employer interest when it concluded that the Pennsylvania Supreme Court would not apply Fourth Amendment restrictions to private employer drug testing. *Id.* For a further discussion of the stress on the employer's interests in running his or her business, see *supra* note 35.

the reasoning behind *Rogers*.[308] Historically, however, Pennsylvania courts have ascertained public policy exclusively from evidence "embodied in a constitutionally or legislatively established prohibition, requirement, or privilege."[309] While the Third Circuit recognized this fact, the court simply stated that "Pennsylvania courts have also recognized other sources as competent evidence of public policy."[310] There is no indication that the Pennsylvania Supreme Court would regard this tort as a clearly mandated public policy, especially because it is embodied only in the Pennsylvania common law and not in a statute or constitution. Given the limited acceptance of the public policy exception under Pennsylvania law and the fact that no Pennsylvania court has previously looked exclusively to the common-law as evidence of public policy,[311] it is difficult to understand how the Third Circuit arrived at its conclusion.

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308. 500 F. Supp. 867 (W.D. Pa. 1980). While the *Borse* court recognized the tort of invasion of privacy, the court did not explicitly rely on this tort as evidence of the public policy. *Borse*, 963 F.2d at 620-26. For a discussion of the *Borse* court's reasoning concerning the finding of the public policy, see notes 226-84 and accompanying text.

The difficulty with relying on the *Rogers* decision is that the *Rogers* court did not hold that an intrusion into a private matter constituted a violation of a clearly mandated public policy. Instead, the *Rogers* court examined two distinct issues: whether the discharge was wrongful and whether the employer's actions constituted an intrusion upon the employee's seclusion. *Rogers*, 500 F. Supp. at 869-70. Neither *Rogers* nor *Borse* contained any analysis of why an intrusion upon a person's seclusion constitutes "a clear mandate of public policy" in Pennsylvania.

While the *Borse* court pointed to two situations in which an employer's drug testing program could intrude upon the employee's seclusion, the court did not examine or weigh evidence that would point to the Pennsylvania Supreme Court accepting the tort as a clear mandate of public policy. Here again Justice Hutchinson saw "no indication anywhere in Pennsylvania's decisional law from which a strong policy favoring employee privacy *over* random drug testing could be inferred in the context of employment at will." *Borse*, 963 F.2d at 627. Justice Hutchinson stated that "[n]o Pennsylvania court has even considered whether an employer's tortious invasion of an employee-at-will's privacy precludes discharge. The decision [in *Rogers*] . . . relied on by the Court is not to the contrary." *Id.*

309. Smith v. Calgon Carbon Corp., 917 F.2d 1338, 1340 (3d Cir. 1990). Thus, the Third Circuit saw little evidence that the Pennsylvania Supreme Court would find a clear mandate of public policy. *Id.* For a discussion of *Smith*, see *supra* notes 186-95 and accompanying text. For a discussion of the possible sources of public policy, see *supra* notes 123-54 and accompanying text.

310. *Borse*, 963 F.2d at 627. After examining Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983), the *Borse* court held that the United States Constitution can be a source of public policy. *Borse*, 963 F.2d at 619. The *Borse* court noted that "[a]lthough the Superior Court has never upheld a wrongful discharge cause of action that depended upon a public policy stated *solely* in a constitutional provision, two of its three cases upholding wrongful discharge causes of action relied upon constitutional provisions as evidence of pubic policy." *Id.* at 618. However, the Third Circuit failed to spell out any other competent sources for public policy in Pennsylvania.

311. For a discussion of the sources that Pennsylvania courts have looked to in finding a public policy, see *supra* notes 123-54 and accompanying text.

The second problem with the *Borse* decision concerns the balancing test the court developed to determine whether an employer's program is highly offensive to a reasonable person.[312] While the *Borse* court recognized that Pennsylvania law "reflects 'a pattern of favoring the employer's interests in running its business,' and a willingness to define that interest broadly," the court failed to properly balance this factor against the employee's privacy interest.[313] Hypothetically, if the Pennsylvania Supreme Court determined that the employer's interest in maintaining a drug free workplace was sufficiently strong, that interest might outweigh any privacy interest the employee could assert.[314] Because the Third Circuit gave little guidance in determining the exact weight that should be given to each interest, employers are left with the task of determining how the Pennsylvania Supreme Court would weigh each of these factors.

The Third Circuit's decision in *Borse* will impact any private employer who has either initiated a drug testing program or is deciding whether to do so. Unfortunately, the Third Circuit's decision fails to give substantial guidance to employers in developing such programs. While it is clear that an employer's drug testing program can violate public policy by intruding upon the seclusion of employees, it is not clear what aspects of an employer's program could potentially meet the "highly offensive to a reasonable person test."[315] Despite the court's ambiguity, however, certain guiding principles can be drawn from dicta in *Borse*, as well as from similar cases.[316]

First, an employer need not limit testing to reasonable suspicion or to employees involved in safety sensitive jobs. The *Borse* court opined that the Pennsylvania Supreme Court will not apply these restriction to private employees.[317] Because these Fourth Amendment restrictions do not apply to private employers, all employees are subject to random

312. For a discussion of the test set forth in *Borse*, see supra notes 291-95 and accompanying text.

313. *Borse*, 963 F.2d at 626 (citations omitted).

314. The Sixth Circuit arrived at this conclusion in Baggs v. Eagle-Picher Indus., Inc., 957 F.2d 268 (6th Cir. 1992). Because state statutes strongly emphasized the interests of an employer, the Sixth Circuit refused to find a public policy against drug testing based on invasion of privacy claims. *Id.* at 275.

Justice Hutchinson stated that "[i]ndeed, one might argue that there is a policy in favor of a drug-free workplace that is at least as strong as the right of privacy involved in random drug testing of private employees." *Borse*, 963 F.2d at 628.

315. For a discussion of the "highly offensive to a reasonable person test," see supra notes 291-95 and accompanying text.

316. *See, e.g.*, Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1135 (Alaska 1989); Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. Ct. App. 1989); Hennessey v. Coastal Eagle Point Oil, 589 A.2d 170 (N.J. Super. 1991), *cert. granted*, 598 A.2d 897, *and aff'd*, 609 A.2d 11 (1992) .

317. *Borse*, 963 F.2d at 625-26.

drug testing regardless of the nature of their work.[318] However, this is not to suggest that the nature of an employees work is irrelevant. It is conceivable that a court might look to the nature of the work in giving weight to the employer's interest in a drug free workplace. This in turn would affect the outcome of the balance between the employer's workplace interest and the employee's privacy interest.

Second, when collecting the urine sample the employer should refrain from directly observing the collection of the sample. The method in which the sample is collected is one area in which the *Borse* court indicated that a program might be "highly offensive to the reasonable person."[319] Moreover, several courts and state statutes specifically require that the employer refrain from either visual monitoring or supervised urination.[320] In examining the monitoring procedure utilized in *Hennes-*

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318. In analyzing drug testing programs, several courts have stressed an analysis of the "reason the urinalysis is conducted, and not the conduct of the test." *Luedtke*, 768 P.2d at 1135; *see also Hennessey*, 589 A.2d 170 (N.J. Super. 1991) (citing *Leudtke* for examining the reason, not the conduct of urinalysis test). The *Hennessey* court adopted a different approach to drug testing than many of the other courts, stating that:

> [a]lthough urine testing provides an employer with private information, we deem the court's characterization of it . . . as "a significant interference with personal privacy and autonomy" and as a "profoundly demeaning" intrusion to be overstated. Providing a urine sample is a very simple process, one that is performed thousands of times each day in medical laboratories and doctor's offices. The fact that another person of the same sex is present to prevent submission of a false sample is not profoundly demeaning. Men urinate in the presence of other men countless times each day in public restrooms. . . . The privacy interests in the physiological information which can be gleaned from urine testing is afforded substantial protection where, as in this case, the testing procedures are limited and specific.

Hennessey, 598 A.2d at 177. The employer's drug testing program in *Hennessey* involved weekly random testing of five employees by the plant nurse. *Id.* at 173. While there was a monitor in the bathroom to prevent altering the specimen, the monitor was ordered not to look at the employee's genitalia or private parts. *Id.* The urine was then tested solely for drugs and any positive result was confirmed through an alternate method. *Id.*

319. *Borse*, 963 F.2d at 621.

320. In Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (Cal. Ct. App. 1989), the California court considered whether drug testing that was an employment requirement constituted an invasion of privacy under the California Constitution. *Id.* at 202. One of the factors the court examined in upholding the drug testing program was the fact that no one directly observed the taking of the specimen. *Id.* at 204; *see also* Kelley v. Schlumberger Tech. Corp., 849 F.2d 41 (1st Cir. 1988) (direct observation of employees urinating gave rise to invasion of privacy action).

Connecticut's Employment Relations Law states that during the collection of urine for an employer's drug testing program, no one is allowed to visually watch the production of the specimen. CONN. GEN. STAT. § 51w (1991). For a survey of the state's various laws restricting drug testing in the workplace, see Morgan, Lewis & Bockius, eds., *Drug Testing in the Work Place: State-by-State Drug and Alcohol Testing Survey*, 33 WM. & MARY L. REV. 189 (1991).

sey v. Coastal Eagle Point Oil Co.,[321] where the monitors stood behind the employees and "were specifically instructed 'not to look at any parts of the employee's genitalia or private parts,' " the *Borse* court opined that a reasonable person would not find this method highly offensive.[322]

Third, an employer should limit the scope of the testing to those drugs the program is designed to detect. Because urinalysis can reveal conditions unrelated to the use of illegal drugs, the *Borse* court noted that testing for conditions not consented to by employees might be highly offensive to a reasonable person, thus violating public policy.[323] Restricting the types of tests that are performed will insulate an employer from this type of privacy invasion.

Finally, it would be wise for an employer to give adequate notice to employees of the drug testing program, and to develop procedures ensuring that results of the test remain confidential.[324] While publicizing employee's private information is not an element of the tort of intrusion upon seclusion, an employer who publicizes such information may violate other privacy torts, including the torts of false light privacy and unreasonable publicity of one's private life.[325]

It is relatively clear that the Pennsylvania Supreme Court will continue to recognize the public policy exception. Given its groundbreaking recognition of the doctrine and the sweeping acceptance the doctrine has enjoyed in other jurisdictions, it is hard to imagine the court taking a step backwards by refusing to recognize the doctrine. The issue then becomes what approach the court will take in creating additional exceptions. Because the court has previously declined to develop parameters for the exception, the field is wide open for the Pennsylvania Supreme Court. However, given the court's recent reluctance to apply the doctrine, a sweeping application does not appear likely. Because Pennsylvania courts have historically limited the doctrine's appli-

321. 589 A.2d 170 (N.J. 1991).

322. *Borse*, 963 F.2d at 624 (citing Hennessey v. Coastal Eagle Point Oil Co., 589 A.2d 170, 173 (N.J. 1991)). The program in *Hennessey* also consisted of limited testing for drugs only. *Id.*

323. *Id.* at 621. Pregnancy, diabetes and epilepsy are just some of the conditions that may be detected through testing. *Id.* at 623 (citing Skinner v. Railway Labor Employees Association, 109 S. Ct. 1402, 1413 (1989)).

324. At least one court has stressed the notice requirement before an employer can initiate a drug program. *See Wilkinson*, 264 Cal. Rptr. at 199 (noting that one part of program included informing applicants of testing requirements).

325. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977).

While the *Borse* court held that a public policy violation may arise from an employer's drug testing program, it is not at all clear from the court's opinion whether this holding will be restricted to urinalysis or personal property searches. Thus, the case potentially opens a door for at-will employees to bring wrongful discharge actions based on other invasions of an employee's privacy. The full scope of the new exception will only be seen as employees begin to challenge their employer's drug testing programs based on invasion of privacy.

cation to instances in which a clear mandate of public policy is embodied in statutory and constitutional provisions, the Pennsylvania Supreme Court will likely follow such a formula.[326]

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326. It is difficult to place Pennsylvania's approach to the public policy exception into any one of the categories discussed in Section II of this Note. On the one hand, the Pennsylvania Superior Court in *Field* relied heavily on the presence of a statutory duty when establishing an additional public policy exception. 565 A.2d 1170, 1180 (Pa. Super. Ct. 1989). This would tend to indicate following the approach followed by the Wisconsin and Maryland courts, where a statutory right or statutory duty is a prerequisite to a wrongful discharge action. On the other hand, Pennsylvania Superior Court cases have also indicated the need for a balancing test when approaching the doctrine, balancing the employer's workplace interests against the asserted public policy. *See* Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 422 A.2d 611 (Pa. Super. Ct. 1980). Consequently, some approach encompassing both is probably required. The best approach seems to be one which follows the four step analysis set forth by Professor Perritt in Section II of this Note. The Pennsylvania Supreme Court in utilizing this approach will most likely restrict the sources of public policy to solely statutory or a combination of statutory and constitutional mandates of public policy. For a discussion of the varied approaches to analyzing the public policy exception, see *supra* notes 32-61 and accompanying text.